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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~[illegible]~~ 50.

THE MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, APPELLANT,

vs.

THE CITY OF COLUMBUS, L. H. CHAPPELL, MAYOR, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED JUNE 17, 1905.

(19,805.)

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TOBER TERM, 1905.

No. 303.

LE TRUST AND DEPOSIT COMPANY OF ALTIMORE, APPELLANT,

vs.

COLUMBUS, L. H. CHAPPELL, MAYOR, ET AL.

CIRCUIT COURT OF THE UNITED STATES FOR ORTHERN DISTRICT OF GEORGIA.

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NC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1906.

1 *Bill of Complaint.*

In the Circuit Court of the United States for the Northern District of Georgia, Western Division.

To the Honorable the Judges of the Circuit Court of the United States, for the Northern District of Georgia, Western Division.

The Mercantile Trust and Deposit Company of Baltimore, a corporation created by and doing business under the laws of the State of Maryland, and having its office and place of business in the City of Baltimore and State of Maryland, brings this its bill against the City of Columbus, a municipal corporation, in the county of Muscogee, State of Georgia, created by and exercising its municipal and corporate functions under the laws of the State of Georgia, and against L. H. Chappell, of Muscogee County, and a citizen of the State of Georgia, said L. H. Chappell holding at this time the office of Mayor of said City of Columbus, and against E. P. Dismukes, J. I. Darby, W. C. Lawrence, J. D. McPhail, N. L. Dudley, L. T. Jones, R. Weiland, J. T. Monterief, J. L. Newman, W. J. Hartmann, L. A. Camp, F. M. Sommerkamp, E. J. Wynn, J. H. McKnight, Max Banner and T. E. Mitchell, all and singular of Muscogee County, Georgia, and citizens of the State of Georgia, and at this time being the aldermen of the City of Columbus, and against the Columbus Water Works Company, a corporation created by and existing under the laws of the State of Georgia and located in Muscogee County, Georgia, and thereupon, your orator complains and says:

I. Heretofore, to-wit, on the first day of January, 1891, the said Columbus Water Works Company constituted your orator trustee for such person or persons or body politic, as should become

2 the holders of five hundred first mortgage bonds of the Columbus Water Works Company, of one thousand dollars each, amounting in the aggregate to the sum of five hundred thousand dollars, and on said date, mortgaged, conveyed and set over unto your orator as such trustee and its successors, by deed of trust, for the use, benefit and security of said bondholders, and in order to better secure the payment of said bonds and the interest accruing thereon, all and singular the real estate and personal property of the said Columbus Water Works Company, its water works, plant, machinery, reservoirs, pump-houses, standpipes, mains, pipes, hydrants and equipments, and all the rights, easements, privileges and franchises, contracts, choses in action or demands for water supply, and all of its assets, of every kind and description, whether owned by said company, at the time of the execution of said deed of trust or thereafter to be acquired; and more especially the contract made between the Columbus Water Works Company and the City of Columbus, hereinafter referred to.

Said bonds are dated the first day of January, 1891, and are payable in lawful coin of the United States, on the first day of January, 1911, and bear interest from date at the rate of six per cent. per an-

num, payable on the first days of July and January, in each year. After January 1, 1895, the interest on said bonds was by agreement reduced to five per cent. per annum. The covenants and conditions and trusts of the said deed and the powers and duties thereby conferred upon and raised on the part of your orator will fully appear by reference to the said deed. Your orator attaches hereto copy of said deed and marks the same Exhibit "A" and prays leave of reference to the same, as often as may be necessary. The original deed will be to the court shown.

3 II. Said bonds so secured as aforesaid were duly issued, and of the same four hundred have been delivered, eight of which are now in the possession of the receiver, appointed as hereinafter mentioned, of the Columbus Water Works Company, leaving three hundred and ninety-two of the same now outstanding and held by persons who purchased the same in open market for value, and your orator thereby became and is trustee for the holders of said bonds, in accordance with the provisions of said deed.

III. Said bonds were issued and sold by the Columbus Water Works Company in order to raise the money wherewith to construct, equip and complete a system of water-works, for the purpose of carrying out its contract with the City of Columbus in the aforesaid deed referred to.

IV. The contract made between the City of Columbus and the Columbus Water Works Company, heretofore referred to as having been conveyed by and included in the foregoing deed of trust, was made by said City of Columbus on the 7th day of October, 1881, with one Thomas R. White, of the City of Philadelphia and State of Pennsylvania, and such other persons as might be associated with and incorporated with him, it being the intention at that time that a corporation should be organized under the general incorporation laws of the State of Georgia, consisting of the said Thomas R. White and his associates and assigns, to be styled the Columbus Water Works Company. Such corporation was afterwards duly organized and on the 5th day of April, 1882, the Mayor and Council of the City of Columbus were notified that the Columbus Water Works Company had been fully organized and that said White had transferred

4 his contract to the said Company, and thereupon the City of Columbus ratified said transfer to said company and passed the following resolution:

"Resolved, by the Mayor and Council of the City of Columbus that they hereby ratify and assent to the said transfer and assignment and recognize the Columbus Water Works Company as assuming the obligations and entitled to all the rights, privileges and emoluments arising under said contract."

A copy of said contract is hereto attached, marked Exhibit "B" and is hereby made a part hereof, leave of reference to which is prayed as often as may be necessary. The original will be to the court shown.

V. The said Columbus Water Works Company proceeded to construct and put in operation a complete and thorough system of water works, in accordance with the specifications and requirements of

said contract, and from time to time, by the action of the Mayor and Council, extensions of time were granted to said company for the completion of its contract, as provided by the terms thereof, until on the 6th day of November, 1882, the Mayor and Council of the City of Columbus received notice from B. F. Archer, president of the Columbus Water Works Company, that the work provided for in the contract made between the Mayor anad Council and Thomas R. White and subsequently transferred to the Columbus Water Works Company was completed; which said communication, together with the action of council thereon, accepting said works, is hereto attached, Marked Exhibit "C," and is hereby made a part hereof, leave of reference to which is prayed as often as may be necessary.

5 VI. It was provided in Article 7 of said contract, that the City of Columbus should pay the Columbus Water Works Company for fifty double fire hydrants, to be placed on the original five miles of street distribution mentioned in said article, and that both hydrants and valves should be of first class workmanship and proper provision should be made to guard against freezing when in use, etc.; which said provisions were carried out and the number of hydrants has from time to time been increased in accordance with said contract, until at the present time, the amount of the annual rental due from the City of Columbus to the Columbus Water Works Company, by the terms of said contract, is the amount of ten thousand two hundred and sixty dollars and ninety-four cents ($10,260.94) per annum.

Said contract was made and entered into by the City of Columbus for the purpose of affording an adequate fire protection as well as a supply of water for the use of its inhabitants. The contract was the plan adopted by the City of Columbus, for the purpose of furnishing the City of Columbus and its inhabitants with water works, after a careful and business like investigation, as to how these purposes might be accomplished, in the best and most economical manner.

VII. At the time of the making of said contract and the building of said water works, so great was the anxiety of the people of Columbus, as represented by the Mayor and Council thereof, that the said water works should be built, that said Mayor and Council did agree and promise by Art. 15 of said contract, that, "in order to make provisions for the payments of water rents, the Mayor and Council, in making appropriations for the fire and sanitary departments, shall appropriate a sum sufficient to pay the annual rental of the water works, and the Mayor and Council shall receive in pay-

6 ment for any taxes due the City of Columbus the due coupons of any bond issued by Thomas R. White, to an amount not exceeding the rental due by the City to him, in any one year, and the coupons thus taken, shall be received by him in cash payment of said rentals."

Your orator says that the said agreement on the part of said city to receive said due coupons for any taxes due to the City of Columbus, constituted an element of credit in the sale of said bonds, which was very valuable thereto, and enabled said water works company to sell said bonds at a better rate than it could otherwise have done,

and the same have passed into the hands of innocent holders for their full market value; the said holders taking said bonds and relying on the said City of Columbus to faithfully perform its said contract and obligation.

VIII. Your orator further avers that after said work was completed and said contract had been in operation for some years, afterwards, towit, in the year 1886, the corporate limits of the City of Columbus were extended northward and eastward, taking in a territory of one mile square; that said territory is very hilly and the highest points therein are upwards of ninety feet above the level of Broad street, thereby rendering impossible an extension into said territory of said water works system without establishing a new system to be operated by pumps, the old system of said company being operated by gravitation; that in compliance with the demand of the Mayor and Council of the City of Columbus, the said Columbus Water Works Company has purchased land in said annexed territory and established a stand pipe and laid a large amount of pipe,
7 extending from said stand pipe, so that said annexed territory is supplied with water and said upper town system of water works has been connected with the old system in the City of Columbus in such manner that, in case of fire, the pressure it greatly improved and increased; that said improvements were made in a manner satisfactory and acceptable to the Mayor and Council of the City of Columbus.

IX. It was provided by Article 28 of said contract that Thomas R. White or the Columbus Water Works Company should obligate itself to extend mains wherever it should be assured of a permanent annual income of seven hundred dollars per mile of pipe, or one hundred and fifty dollars per annum on a line of one thousand feet, or one hundred dollars on a line of six hundred feet. In many portions of the said City, on account of the poverty of the inhabitants, no permanent annual income on the extensions could be assured, yet the water works company has, from time to time, waived this stipulated amount of annual income and extended its mains wherever the City of Columbus has desired fire hydrants, until the lines of said water works company extend over a large area and include, counting its supply pipes twenty-seven (27) miles, of which twenty-three (23) miles are located within the limits of the City of Columbus, on which are placed one hundred and fifty-seven (157) fire hydrants.

X. Your orator shows that said contract was entered into by the City of Columbus with the full knowledge and free assent of the inhabitants composing and constituting said municipal corporation. Public sentiment in favor of said contract was unanimous and it was not submitted to the qualified voters of the City of Columbus, because the same was not deemed necessary; and your
8 orator alleges that the same was not necessary, but that the said Mayor and Council of the City of Columbus were fully authorized to make said contract in all of its terms, and to bind the City of Columbus, by all of its terms; and your orator alleges that said contract is now a valid, legal and subsisting contract.

XI. Your orator alleges that the Columbus Water Works Com-

pany has used all of the income of said corporation, over and above the sum required to meet the interest on its bonds, in making improvements on said water works system.

During the past year the bridge known as the 14th street bridge was swept away by an unprecedented flood of water, and the pipes bringing the water of the Columbus Water Works Company into the City of Columbus were swept away; said company immediately placed in service its submerged main, under the Chattahoochee river. Later in the night, said submerged main broke, by reason of the fall of a heavy stone pier on which the said bridge had rested, and for a few hours the supply of water was interrupted, for the first and only time during the continuance of the contract. On ascertaining the facts, the company immediately put into operation its pumping system and supplied the City of Columbus with ample water for fire purposes, and later on entered into an arrangement with the Eagle and Phenix Mills whereby all of the fire pumps of said corporation could be used by the said Water Works Company, and said company further installed a telephone connecting with the office of the Eagle and Phenix Mills, so that the City of Columbus has been absolutely provided against any contingency by which its supply of water could fail.

9 After the sweeping away of said bridge, said company commenced immediately to lay an additional main from Alabama into Columbus, at a very great expense, over the bridge occupied by the Central of Georgia Railway Company, and reestablished its connection with its source of supply in Alabama, all of which was done in a remarkably short space of time, and as rapidly as the same could be done, by the use of men and money, and its action in doing the same met, so far as the water works company was informed or ascertained, the unqualified approval of the citizens of Columbus.

XII. The Mayor and Council of the City of Columbus, in making said contract, afforded to their constituency ample opportunity to object to carrying out said contract; they did not act hastily or precipitately, but slowly and carefully during more than a year. They investigated different plans and systems, so as to take such action as would, in their judgment, best carry out the purposes in view and secure the benefits and protection of water works for said city. The contract finally entered into by the City of Columbus on the 7th day of October, 1881, was published in full in the daily papers of the City *of the City* of Columbus; the full contract and every provision thereof was brought within ready reach of every inhabitant of said City. Every citizen, taxpayer, and inhabitant accepted the contract as the authorized act of the City of Columbus, and the same was acquiesced in by every one and no objection was made or step taken to prevent the carrying out of said contract. In pursuance of said contract, the said Columbus Water Works Company was organized and incorporated under the general incorporation laws of the State of Georgia, for the purpose of complying with and carrying

10 out the provisions of the contract. The application for this charter was duly published in a daily newspaper published

in the City of Columbus, as required by law, and the purpose for which said company was organized was generally known by the inhabitants of the City of Columbus. The incorporators of said company constructed and built a complete and thorough system of water works, in accordance with the specifications and requirements of said contract, and, for the purpose of carrying out said contract, said system was finally and fully tested by the City authorities of Columbus and was found to be fully up to the contract requirements and satisfactory in every particular. From the date of said acceptance, the said company has continued to maintain and operate said system of water works in full compliance with said contract and has furnished to the City of Columbus free and unrestricted use of its water for protection against fire, in accordance with the contract, and in every respect has fulfilled and fully met, observed, kept and performed all of the obligations resting upon it, under and by virtue of said contract. The City of Columbus has from the date of the acceptance of said work in 1882 continuously until the present, at all times, enjoyed and possessed said fire protection, under and by virtue of said contract, and has used said water for the purpose of extinguishing fire and preventing the spread of conflagration, as often as fires requiring the services of the fire department have occurred in said city. The inhabitants of said City not only assented and acquiesced in the action of their corporate agents in making said contract, but silently stood by and permitted the Columbus Water Works Company to lay out and expend large sums of money in the purchase of lands material and machinery, the laying of
11 mains, the erection at different times of two stand pipes and two pumping stations, (one a station operated by steam and the other operated by water power and both of which have been built since the original contract was accepted by the City of Columbus), the extensions of its mains into the part of the City annexed in 1886, and other expenses incident to the installation of a first class water works system, in order to carry out said contract. During the number of months which elapsed from the making of the contract and the completion of the works as originally contemplated in said contract, the large force of hands employed, the excavation of the streets and the laying of the pipes in every part of the city and the large outlay of money expended in erecting said plant, in accordance with the contract, could not fail to have been seen and known by every citizen of Columbus. Since the completion of said contract work, aditional work has been done from time to time in the City of Columbus, in which large numbers of hands have been employed at various times and in various parts of the city, up to the present time. No injunction was applied for, no protests made, but the citizens all assented to the arrangement by which said company, at a cost of more than four hundred thousand dollars, has put itself in a position to carry out every part of the contract. The inhabitants of said city, by their silence and acquiescence, have secured to themselves the benefit of a water supply for themselves and their families and their places of business, as well as fire protection for their property.

XIII. Your orator shows that it was known and contemplated by said City of Columbus, at the time of entering into said con-
12 tract, that the money required to build said system of water works was to be raised in whole or in large part by the issue and sale of the bonds of the Columbus Water Works Company and that the rentals which the City of Columbus was to pay would constitute the source from which the bondholders were to be paid the interest on their bonds and from which a fund would be provided toward the ultimate payment of the same, and that said bonds would derive their value from said contract, and that for a considerable period of time the said City would be practically the only customer of the water works company, and in order to render said bonds more desirable the City of Columbus in and by said contract agreed and promised that the due coupons on said bonds should be received by the Mayor and Council in payment of any taxes due the City of Columbus to an amount not exceeding the rental due by the city in any one year; and said bonds were issued and sold *bona fide* to an unsuspecting public without any objection on the part of the City of Columbus, or any inhabitant thereof. By said provisions of said contract, the City of Columbus invited persons to become purchasers of said bonds, upon the faith that the city would keep and perform the obligations contained in said contract.

XIV. The bonds of said Columbus Water Works Company issued as contemplated by said contract were negotiated and sold upon the faith that the City of Columbus would pay said rental annually, as by said contract it had promised to do. The proceeds of said bonds, amounting to three hundred and ninety-two thousand dollars, were used in the construction of said system of water works.

XV. Both the original company which furnished the
13 money to construct said water works and the present holders of said bonds who afterwards purchased the same for value, in open market, relied and had a right to rely upon the aforesaid contract of the City of Columbus, and acted upon the faith that the same was a valid and binding obligation, said contract having been entered into by the City authorities by and with the assent of the citizens of said city. Said citizens had acquiesced in and by their conduct ratified the action of their corporate agents in making the contract, if authorization of their part had been necessary.

XVI. Your orator shows that by virtue of said contract, the said Mayor and Council granted to the Columbus Water Works Company the exclusive privilege of maintaining and operating water works in said city for a period of thirty years, or until such time as they might be purchased by the city, and during such time to rent hydrants from said water company and pay for the same, as in said contract provided. It was further provided in said contract that the Mayor and Council should have the right, at the end of fifteen years from the completion of said works, to buy the same, with all the rights, franchises and property belonging thereunto, and it is provided in said contract for an arbitration of three disinterested parties to ascertain the value of said works, and that the Mayor and Council shall have the right to decline to purchase the works after

said value may have been so declared, upon the payment of the costs of the arbitration; and it is further provided, that in the event of the city not making the purchase, the rights and franchises of the water company shall continue in force until the final purchase of
14 the works by the city, and that the right to purchase shall inure to the city every fifteen years, upon its giving twelve months' previous notice of its intention to purchase.

Your orator says that under said contract, the Mayor and Council cannot build or operate any water works system, of its own, for its own use, or for the use of others, during the period mentioned in said contract and that said period has not yet elapsed; and that said contract is still in force and is a binding and valid contract, and that said Mayor and Council have no right under the terms of said contract to build or operate a system of water works, which will come in conflict with the rights of the Columbus Water Works Company, of your orator and of the bondholders represented by your orator.

XVII. Your orator shows that on the 14th day of September, 1902, the City Council of Columbus passed an ordinance ordering an election of the qualified voters of the City of Columbus, to be held on the 4th day of December, 1902, by the terms of which said ordinance the issuance of two hundred and fifty thousand dollars of bonds was provided for; the proceeds of said bonds to be used in building, equipping, owning and operating a system of water works by the City of Columbus, with the avowed purpose as expressed in said ordinance of furnishing water to private parties, in competition with the Columbus Water Works Company, as well as for the use of the city; and it was further stated in said ordinance that the proceeds to be derived from the operation of said water works by the city would, in the opinion of said council, be more than sufficient to pay the principal and interest on said issue of bonds.

It was further declared in said ordinance that the owning
15 by the city of her own water works would result in a great saving to the city, in the cost of fire protection, sanitation and other purposes. A copy of said ordinance is herewith filed, as part hereof, marked Exhibit "D." Said election was held and the result declared to be in favor of the issuance of said bonds and the said City of Columbus is now threatening and proceeding to sell said bonds and to build said water works as appears from the resolution of its City Council passed on May 6, 1903, a copy of which is herewith filed as part hereof marked Exhibit "E."

The Mayor and Finance Committee of said City of Columbus in pursuance of said design to build a system of water works have also prepared and issued circulars inviting bids to be submitted, up to noon of Saturday, August 8th, 1903, for the purchase of $250,000 of the bonds of said City to be issued for the purpose of constructing, owning and operating a system of water works for said City, a copy of which circular is herewith filed as part hereof, marked Exhibit "F." Said bonds will, when issued, pass into the hands of innocent owners, unless the authorities of said city are restrained by the order of this honorable court from so doing.

The said City, by its action above set forth, has utterly repudiated

its contract solemnly entered into with the Columbus Water Works Company, and disavow any liability thereunder, in violation of the rights of your orator, of the Columbus Water Works Company, and of the holders of the first mortgage bonds represented by your orator.

XVIII. Your orator shows that said contract made by and between the Columbus Water Works Company and the City of Columbus looked to the final purchase of said water works by the city;
16 and the building of the same was supervised by a committee of council and citizens appointed by the Mayor and Council; and the requirements of said city were fully complied with in the building of said water works, and said works were built with the object and intention on the part of said city of purchasing the same, whenever it should be to the interest of the city so to do; and a reasonable and fair construction of said contract will show that the rights and franchises conferred on said company by said contract were to continue until said works should be finally purchased by said City of Columbus, in the manner prescribed in said contract. The right is reserved to the city to purchase said water works and all of its rights, property and franchises, at the end of each period of fifteen years on giving to said water company twelve months' previous notice of its intention to purchase the same but the city has made no offer and taken no proceedings for the purchase of the said plant of the Columbus Water Works Company in accordance with the provisions of the contract aforesaid.

All of the improvements on said system made by said company, from time to time, have been made in accordance with the terms of said contract and in accordance with the demand of said city and under the direction and supervision of the city authorities; yet the said city authorities, disregarding the rights of your orator and of the said water works company and of the holders of the bonds of which your orator is trustee, are now seeking to establish and operate an independent water works system in the City of Columbus, the object of which is to compete with and destroy the water works company, for which your orator is trustee, and to render the same valueless, and to force the same to be operated at a loss by reason of its
17 patronage being destroyed, and to deprive the same of its property without due process of law, by disregarding the contract rights of the said Columbus Water Works Company and by pursuing a course which is wholly subsersive of the terms of said contract and of the good faith to be required and expected of said City of Columbus.

XIX. Your orator charges that the purpose of said city in repudiating the contract above referred to is to destroy the value of said water works property, by withdrawing from the company revenues necessary to the existence of the same, and thereby force said company to sell the said plant to the city, at any price the said city may see fit to name. The water works company is willing to sell to said city the said water works plant for what it is fairly and reasonably worth, but the City of Columbus is only willing to purchase said water works, for very much less than its cost and very much less than its value, and has totally disregarded the stipulations of it

aforesaid contract with the water works company, requiring it to ascertain the value of said water works plant by arbitration. Your orator submits that the conduct on the part of the city in endeavoring to depreciate the property of the water company, by repudiating its contract with said company, is unjust and inequitable.

XX. Your orator shows that in the month of December, 1902, it was informed by said Columbus Water Works Company that by reason of the constant agitation in favor of a municipal water works plant on the part of the City of Columbus, by the refusal of the City to pay its water rents when due, by the conduct of said city in
18 proceeding to have said bond election and also to obtain permission therefor from the General Assembly of Georgia by an Act passed on the 3rd day of December, 1902, and for other reasons, that the said water works company found itself unable to pay the interest falling due and payable to the bondholders of said company, on January 1st, 1903; for which bondholders your orator is trustee; whereupon, your orator filed its bill in this honorable court on the 22d day of December, 1902, which is of file and leave of reference to which is prayed as often as may be necessary, and William S. Greene was appointed receiver of said Columbus Water Works Company, by order of this honorable court; that said Greene immediately caused surveys and estimates to be made for perfecting the water works system of said company and furnishing a supply of water to Columbus sufficient for the present and future growth of said city, so as to make available for drinking purposes and for fire purposes, and all purposes for which said water works company has heretofore furnished water, a supply of pure filtered water, amounting to over two millions of gallons of water per day; said William S. Greene has applied to this honorable court for permission to issue one hundred and fifty thousand dollars of receiver's certificates, on which petition, by the order of this honorable court, leave was granted to immediately issue the sum of fifty thousand dollars of receiver's certificates, reserving the right to increase the said amount from time to time to the sum of one hundred and fifty thousand dollars; which said sum is amply sufficient to supply said city with all the water for all purposes that it can possibly need.

XXI. Your orator shows that of said water rents the sum
19 of two thousand five hundred dollars is now due and unpaid by said City of Columbus, and the said amount is now unlawfully and illegally withheld by said City of Columbus, and it declines and refuses to pay the same.

XXII. Your orator shows that the aforesaid threatened wrongs and injuries, about to be committed by the said City of Columbus, will, unless immediately restrained and prevented, irreparably damage the holders of the bonds of the Columbus Water Works Company whose rights and interest are in the keeping of your orator, as trustee.

The Columbus Water Works Company has no property save and except its water works plant, and its aforesaid contract with the said City of Columbus. It has no revenues wherewith to meet the payment of its operating expenses, and interest on its bonds, save and

except the rental stipulated to be paid by the City of Columbus for the water furnished and to be furnished by said company for fire protection, and the revenue derived from the use of water by private consumers. The latter is to a large extent exhausted in operating expenses, and without the aforesaid rental to be paid by the city, said company would not have sufficient revenue wherewith to pay interest on its bonds, and bondholders would lose their interest wholly or in large part. Without revenue sufficient to make said water works self-sustaining said water works plant becomes valueless, save and except as its mains could be dug up, and sent off and sold elsewhere, and its machinery and materials sold or utilized in a dismantled condition, which could not be made to yield a sufficient amount to pay one-fourth of said bonds.

Moreover, if said City of Columbus be permitted to erect and operate an opposition system of water works, the present
20 water works company would not be in a position to compete successfully for the patronage of private consumers. The City of Columbus is not large enough to support two systems of water works, involving two sets of mains, side by side, double pumping stations and stand pipes, a double investment, and a double set of operating expenses. One or the other system must necessarily give way; and as the citizens would in their capacity as taxpayers be compelled to make good all losses that might arise to the water works operated by the municipality, it would of course be to their interest to support that system by their patronage, thus leaving the private company practically without business.

XXIII. Your orator shows that the bonds of the said water works company are held by numerous private owners; and that it is impracticable for them to take steps for their own protection. Your orator, therefore, has found it necessary as their trustee, to proceed in their interest, and apply to this honorable court to save the property, which forms their security, from irredeemable injury and to protect and enforce the contract which constitutes the chief source from which they can derive interest on their bonds, and provide a fund for the payment of the same, and which gives to said water works property its chief value.

XXIV. Your orator shows that notwithstanding the validity of the aforesaid contract set forth in Exhibit "B" to this bill, and notwithstanding the facts that said bonds were marketed on the faith of said contract, and said water works were erected at great expense, and that the water works company has complied with the
21 terms and conditions of said contract, yet the General Assembly of the State of Georgia has by its Act of December 3, 1902, aforesaid, and the said City of Columbus, has by its ordinances conduct and proceedings attempted to impair the obligation of said contract, thereby greatly diminishing and to a large extent destroying the value of the property of said water works company, which constitutes the security possessed by the bondholders; and said city has deprived the bondholders of the rentals which were to be paid by it under said contract, and said action and threatened action of said city are in fraud and destruction of the rights of said bondholders,

and your orator as their trustee, under said contract with the city, and the protection guaranteed under the Constitution of the United States.

The aforesaid ordinance passed by the said City of Columbus on the 14th day of September, 1902, ordering an election for the purpose of dertermining whether two-thirds of the qualified voters of said city should by their assent authorize said city to issue two hundred and fifty thousand dollars of bonds, for the purpose of building, owning, equipping and operating a system of water works, and the holding of the bond election on December 4th, 1902, pursuant to the provisions of said ordinance, and the carrying of said proposition by the requisite two-thirds of the qualified voters of said city, and the ordinance or resolution passed by said City of Columbus on the 4th day of December, 1902, whereby the result of said election was declared to be in favor of the issue and sale of bonds for said purpose, as well as the subsequent conduct of said city in giving effect to said ordinances; are each and all attempts on the part of said City of Columbus to impair the obligation of said contract in violation of the Constitution of the United States and the protection thereby guaranteed to private rights.

22 All of said ordinances, acts, resolutions, proceedings and conduct are an effort and attempt on the part of said City of Columbus to impair the obligations of said contract under color of a claim of authority from the Constitution and Laws of the State of Georgia, and particularly of the Act of the General Assembly of Georgia of December 3, 1902, aforesaid, in violation and attempted impairment of the protection guaranteed to said contract under the Constitution of the United States.

The City of Columbus, in further attempted violation of the obligation of said contract, contrary to the provision of the Constitution of the United States that no State shall pass any law impairing the obligation of contracts, under color of the authority given it by its charter to make and adopt all ordinances, by-laws, rules and regulations, necessary or proper for the security, welfare, convenience and interests of said city and its inhabitants, and for preserving the health, morals, peace, order and good government of the same, has adopted the aforesaid ordinances, and is proceeding, through its municipal officers and authorities, to carry out the same.

The foregoing ordinances, resolutions, acts, proceedings and conduct of said City of Columbus constitute and are a deprivation of the rights and property of your orator, of the bondholders represented by your orator and of the Columbus Water Works Company, without due process of law, and a denial to them of the equal protection of the laws, contrary to the provisions of the Constitutions of the State of Georgia and of the United States.

All of which wrongs and threatened wrongs are contrary to equity and good conscience, and are irreparable, and can only be

23 relieved against and prevented by the gracious interposition of a court of Equity.

Your orator shows that the present suit arises under the Constitution and Laws of the United States, and your orator invokes the

jurisdiction of the Circuit Court of the United States, in order to set up and enforce the protection guaranteed by the Constitution of the United States to contract rights, and to prevent and defeat the effort of said City of Columbus to impair the obligation of the aforesaid contract and to deprive your orator, the bondholders represented by your orator and the Columbus Water Works Company of their property and rights, without due process of law, and to deny to them the equal protection of the laws.

XXV. Your orator, for and on behalf of said bondholders, and such other person or persons as may be entitled to its aid, as trustee, brings this its bill for injunction and relief such as may be appropriately afforded by a court of equity.

Your orator shows that the acts and wrongs of the said City of Columbus, and its officers, agents and confederates are contrary to equity and good conscience, and tend manifestly and greatly to the damage, injury and utter ruin of the bondholders of the Columbus Water Works Company, and persons having the rights of bondholders, and that your orator, as well as those for whose use and benefit your orator sues as trustee, are utterly without remedy at law, and can only have adequate relief in a court of equity.

The acts already done have very greatly injured and very seriously jeopardized the rights of said bondholders, and unless the aforesaid threatened acts and wrongs are at once restrained and pre-
24 vented, by the gracious interposition of a court of equity, the properties, rights and benefits conveyed, and mortgaged by the aforesaid deed of trust or mortgage, will be destroyed, and rendered valueless, and the injury thereby sustained will be irreparable. The contract which alone insures to bondholders the payment of interest on their bonds will be wholly lost; the revenues from said water works property will be cut off and destroyed; the Columbus Water Works Company will no longer be able to pay operating expenses, or make needed repairs; the property of said company will be depreciated and will prove wholly insufficient to pay off the aforesaid bonded indebtedness thereon; and bondholders will not only lose the interest, but will also lose a large part of the principal of their debt.

XXVI. Your orator further shows that the wrongful conduct of the City of Columbus in refusing to pay for said water or to be further bound by the obligation of said contract and in destroying without compensation the property values and rights dependent upon the exclusive franchises, rentals and revenues guaranteed by said contract, and the wrongful threatened conduct of the City in proceeding to erect and operate a rival system of water works for fire protection and for supplying the inhabitants with water, in violation of said contract, is an attempt at, and, unless restrained and prevented will have the effect of depriving the bondholders of said water works company and your orator, as trustee, as well as said water works company, of their property without due process of law contrary to the protection guaranteed by the Constitution of the United States. Your orator avers that said City is not permitted by the Con-

stitution of the United States to thus legislate said water
25 works company and the holders of its bonds and their trustee out of their vested contract and property rights, without compensation.

Wherefore, your orator, suing as trustee, humbly prays:

First. That the writ of injunction may be issued, directed to the City of Columbus, its Mayor and Board of Aldermen, their officers, agents, confederates and abettors, constraining them or either of them, from erecting, constructing, installing, operating (or planning or proceeding so to do) any system of water works, in or for the City of Columbus, or for furnishing the citizens or inhabitants of said City with water, for domestic, sanitary or other purposes, or from entering into any contract or arrangement with any person, firm or corporation (other than the existing contract with the Columbus Water Works Company) for the construction, lease, operation or use of any system of water works, or for the supply of water for fire protection, or other municipal purposes, or from laying mains or other water works, or water pipes, or permitting the laying of pipes, mains or the construction of water works, in violation of the aforesaid contract or the exclusive rights given thereby; or from selling or offering for sale, or disposing of any bonds of the City of Columbus hereinbefore mentioned and described, or from paying out any monies for water works or from incurring any obligation for water works, or from entering upon or carrying out any contract for water works (save and except the aforesaid contract between the City of Columbus and the Columbus Water Works Company), or from refusing to carry out or forbidding or preventing any person, organization, fire company, or agency from carrying out the afore-
26 said contract with the Columbus Water Works Company; or from placing any obstacle in the way of the due carrying out and performance and fulfillment thereof, according to its terms, or from ordering, directing, ordaining or by corporate act or ordinance or otherwise, causing, advising, counseling or procuring the fire department, fire companies or other fire organization or individuals, acting as a fire department or company, or using the city fire apparatus, to desist or refrain from the use of water furnished by the Columbus Water Works Company; or from doing any other act or acts in violation of the covenants, stipulations, terms and conditions of said contract.

Second. That the court grant a temporary restraining order restraining the several things in the preceding prayer mentioned, until a hearing can be had; and that on the preliminary hearing, a temporary injunction be also granted, restraining said acts, until a final decree be had in said cause.

Third. That the aforesaid contract between the City of Columbus and the Columbus Water Works Company be decreed and declared to be a valid and mutually binding contract and obligation upon the said City of Columbus and said Columbus Water Works Company; and that the City of Columbus be decreed and adjudged to be estopped by its conduct from disputing the validity thereof.

Fourth. That said contract be specifically enforced and the said

City of Columbus be decreed, compelled and required to specifically perform its contract and perform all the covenants, stipulations and agreements therein contained; and in particular to accept
27 and use said water and annually levy a tax upon the taxable property of said City sufficient to pay for the same; and to pay for the same during the continuance of said contract.

Fifth. That the Columbus Water Works Company may be made a party defendant to this bill, for the purpose of binding it by the judgment and decree that may be rendered in this case, and so that the right and equity of subrogation and all other rights and equities therein set up may be enforced and decreed against the said Columbus Water Works Company, and that the said Columbus Water Works Company may be held and decreed, on its part, to specifically perform all of its obligations under said contract.

Sixth. That your honors may grant unto your orator and to those for whose benefit your orator sues such other and further relief, as to your honors may seem meet and just in the premises.

Your orator expressly waives discovery and answer under oath from each and all of the defendants herein named.

And may it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the City of Columbus, said L. H. Chappell, Mayor of said City, E. P. Dismukes, J. I. Darby, W. C. Lawrence, J. D. McPhail, N. L. Dudley, L. T. Jones, R. Weiland, J. T. Monterief, J. L. Newman, W. J. Hartman, L. A. Camp, F. M. Somerkamp, E. J. Wynn, J. H. McKnight, Max Banner and T. E. Mitchell, constituting the Board of Aldermen of said City of Columbus; and the Columbus Water Works Company, commanding them and each of them, on a
28 day certain to appear and answer this bill of complaint and to abide and perform such order and decree in the premises, as to the court may seem proper and that may be required by the principles of equity and good conscience.

MERCANTILE TRUST & DEPOSIT CO.
OF BALTIMORE, *Trustee*,
By JOHN GILL, *President*.

[Seal M. T. & Dep. Co.]

Attest: J. R. WALKER, *Secretary*.

JOSEPH PACKARD, 207 *N. Calvert St., Baltimore, Md.*,
HALL & WIMBERLY, *Macon, Ga.*,
LOUIS F. GARRARD, *Columbus, Ga.*,
Solicitors for Complainant.

STATE OF MARYLAND, *Baltimore City, to-wit:*

I hereby certify that on this 1st day of July, 1903, before the undersigned, a notary public in and for the State and City aforesaid personally appeared John Gill, president of the Mercantile Trust and Deposit Company of Baltimore and made oath in due form of

law that the facts stated in the foregoing bill are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal, the day and year aforesaid.

THOS. H. FITCHETT,
Notary Public.

(Seal of N. P.)

Filing.—Filed in Clerk's office July 30, 1903.

O. C. FULLER, *Clerk.*
By N. A. BROWN, *Deputy.*

29 EXHIBIT "A."

This indenture made this first day of January, in the year eighteen hundred and ninety-one, between the Columbus Water Works Company of Columbus, Georgia, a corporation duly chartered, organized and existing under the laws of the State of Georgia, party of the first part; and The Mercantile Trust and Deposit Company of Baltimore, a corporation duly chartered, organized and existing under the laws of the State of Maryland, and capable of acting in the capacity of Trustee, by and in pursuance of law; party of the second part;

Whereas the said party of the first part is authorized under the laws of the State of Georgia and by the terms of its Charter to borrow money for the purpose for which it was incorporated, and for that purpose to execute bonds and convey its property, privileges and franchises to secure said bonds, and to sell, hypothecate or exchange said bonds;

And whereas, heretofore, towit, on the 3rd day of December, 1890, the stockholders of the said Columbus Water Works Company, at a meeting duly called for the purpose of devising means for raising money for its corporate purposes, unanimously adopted the following resolutions:

Whereas this company did on the first (1st) day of November, 1888, make and execute a deed of trust to secure its issue of $150,000. of bonds;

And whereas arrangements have been made to secure the release of said deed of trust and to cancel said bonds.

And whereas it is proposed to raise money for the purpose of paying off said bonds, and of making additions and improvements to the works of this company and providing for future extensions and improvements thereof.

30 Resolved that this company make, execute and deliver its five hundred of negotiable bonds of one thousand dollars each, numbered consecutively from number one (1) to number five hundred (500) both inclusive, bearing date January 1, 1891, and to become due and payable January 1st, 1911, with interest at six per cent. per annum, payable semi-annually according to forty coupons to be annexed to each of said bonds, principal and interest, to be payable in gold coin of the United States:

Resolved that said bonds shall be of such form and of such tenor and effect as to the Board of Directors of this company shall seem

best, provided the same shall be in accordance with the terms of these resolutions.

Resolved that to secure the payment of said five hundred bonds or so many of them as shall at any time be outstanding, without preference or priority, interest and principal, this company make, execute and deliver to the Mercantile Trust and Deposit Company of Baltimore a deed of trust conveying to it all this company's property real and personal, its water works, plant, machinery, reservoirs, pump houses, stand pipes, mains, pipes, hydrants, and equipments, and all the rights, easements, privileges and franchises, contracts, choses in action or demands for water supplied, and all its assets of every kind and description whether owned by this company at the time of the execution of said deed of trust or thereafter to be acquired.

Resolved that such deed of trust shall be in such form and of such tenor and effect and shall contain such covenants, agreements, conditions, stipulations and provisions and shall be executed in such manner as to the board of directors of this company shall seem best, provided that said deed of trust shall be in accordance with the terms of these resolutions.

Resolved that when said bonds and deed of trust shall have been executed substantially in form, manner, tenor and effect determined upon by the board of directors of this company and delivered, they shall be the bonds and deed of trust of this company and such execution thereof shall be evidence in all courts and places of the approval of this company of the term of said bonds and deed of trust and of their due execution by this company.

Resolved that the Mercantile Trust and Deposit Company of Baltimore be appointed trustee under all the trusts in connection with said bonds and the deed of trust securing the same.

Resolved that three hundred and twenty-five of said bonds by these resolutions authorized, being the bonds numbered from number one (1) to number three hundred and twenty-five (325) both inclusive be sold by the board of directors of this company upon such terms and conditions as to them shall seem best.

Resolved that one hundred and seventy five of said bonds by these resolutions authorized, being bonds numbered from number three hundred and twenty six (326) to number five hundred (500) both inclusive, be deposited with the Mercantile Trust and Deposit Company of Baltimore as trustee, for the purpose of future sale for the making of enlargements, extensions, improvements and renewals to the future, but none of said one hundred and seventy five bonds shall be delivered or issued or suffered to be outstanding except substantially, in the following manner: When the board of directors of this company shall have determined to make any improvements, enlargements or extensions of its water works or plant, at or near the City of Columbus, Georgia, and shall have expended in cash the sum of at least five thousand dollars, and shall present to the said trustee a statement of such improvements, extensions and additions together with an itemized statement of the cost thereof, certified by certificate of the president and affidavit of the secretary of this company, it shall be the duty of the trustee to deliver to the order

of the president and secretary of this company, so many of the said one hundred and seventy five bonds then remaining in trust with said trustee as shall be sufficient, at par, to pay the said disbursements so made on account of such improvements, enlargements or extensions, provided that the said trustee shall require of this company a statement of its actual income, expenses and taxes during the six months next proceeding the application for such bonds, verified by the oath of the president and treasurer of this company, and if it shall appear from said statement that the actual income of the company at the rate of income for the said six months over and above operating expenses, taxes and interest on bonds authorized by these resolutions then already outstanding is sufficient to pay the interest on the additional bonds applied for, it shall be the duty of the said trustee to issue and deliver the same to the order of the president and secretary of this company under seal thereof;

Resolved that said trustee shall, as often as a semi-annual payment of interest becomes due cut off and cancel the matured coupons attached to all of said bonds so remaining in trust with it, so that none of said bonds shall have any past due coupons thereon.

And whereas, the board of directors of the party of the first part, at a meeting duly held on the 13th day of January, 1891,
33 have resolved that the said bonds shall be of the form, tenor and effect hereinafter set forth, and shall be sealed by the seal of the party of the first part and signed as indicated in said form by the president and secretary of the party of the first part, and with the coupons annexed and certified as hereinafter set forth by the said trustee, and have adopted these presents as the form of the said deed of trust to secure said bonds.

And whereas the said Columbus Water Works Company of Columbus, has made, executed and delivered to the said trustee its five hundred (500) negotiable bonds of the sum of one thousand dollars (1000) each of the form tenor and effect adopted by its board of directors, which are as follows: that is to say:

(*Form of Bond*)

Total issue, $500,000.

1891. UNITED STATES OF AMERICA. 1911.

Georgia.

"The Columbus Water Works Company of Columbus."

"The Columbus Water Works Company of Columbus, Georgia, a corporation duly chartered and organized under the laws of the State of Georgia, acknowledge itself indebted to the bearer in the sum of one thousand dollars, which it binds itself to pay in gold coin of the United States at the office of the Mercantile Trust and Deposit Company of Baltimore, in the City of Baltimore, on the first day of January, 1911, and binds itself to pay interest thereon in gold coin of the

United States on the first days of July and January in each and every year upon the presentation and surrender of the interest coupon hereto attached according to the tenor and terms thereof at the rate of six per centum per annum.

This bond is one of five hundred of similar amount, tenor and date secured by a deed of trust of even date herewith to the
34 Mercantile Trust and Deposit Company of Baltimore, when the certificate thereon shall be signed by said trustee.

In witness whereof the said Columbus Water Works Company of Columbus, Georgia, has caused its seal and the signature of the president and secretary to be affixed hereto, on the first day of January, 1891.

[L. S.]

—— ——,
President of the Columbus Water Works.

—— ——,
Secretary of the Columbus Water Works Company.

And each of said bonds has attached to it forty coupons (with fac simile of the signature of —— ——, the secretary of the party of the first part affixed thereto, which fac-simile is hereby declared to be the true and genuine signature of such secretary and of the same force, validity and effect as if made with his own hand) for each semi-annual instalment of interest to accrue thereon payable when and as they respectively become due, which coupons are in the following form:

Interest Coupon $30.00

The Columbus Water Works Company of Columbus, Georgia, will pay to the bearer thirty dollars at the office of the Mercantile Trust and Deposit Company of Baltimore, in Baltimore, Maryland, on the — day of —, A. D. —, being six months' interest on Mortgage Bond number —.

—— ——, *Secretary.*

And the better to identify the said bonds as those entitled to the security afforded by this deed of trust, each of them has en-
35 dorsed upon it a certificate to be signed by the party of the second part before said party of the second part shall deliver the same, as follows:

Trustee's Certificate.

The Mercantile Trust and Deposit Company of Baltimore hereby certifies that this bond is one of the series issued according to the terms of the Deed of Trust securing the same.

(Signed) THE MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, *Trustee.*

By —— ——, *President.*

Now therefore, this indenture witnesseth, That the said Columbus Water Works Company, party of the first part, in pursuance of and by the authority of law and of the proceedings of the stockholders

and Board of Directors of the said company hereinbefore set forth in order to secure the payment of the principal and interest of the bonds above described without preference or priority and in consideration of the premises and of the sum of five dollars to it in hand paid by the Mercantile Trust and Deposit Company of Baltimore, party of the second part, the said trustee, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, released, remised, enfeoffed, conveyed and confirmed and by these presents doth grant, bargain, sell, remise, enfeoff, convey and confirm unto the said party of the second part its successors and assigns as such trustee for the uses and purposes and subject to the trusts, stipulations and conditions hereinafter expressed, all those tracts or parcels of land described as follows:

36 First. All that tract or parcel of land lying and being in the County of Lee and State of Alabama, the same being a part of Section 33, Township 18, Range 30, described as follows: Beginning at a point on the south line of said section 33, 80 rods east from the southwest corner of said section, thence north 80 rods, thence east 458 feet, thence south 527 feet and 2 inches, thence east 162 feet and 9 inches, thence south 300 feet, thence west 162 feet 9 inches, thence south 492 feet 10 inches, thence west 458 feet to original starting point, containing 15 acres of land including a mill site on Holland creek, with all the water rights and privileges pertaining thereto." Which tract was conveyed by Paul T. Jones, Jr., and Grace R. Jones, his wife, to The Columbus Water Works Company by deed dated 11th day of April, 1882; and recorded in the office of the Judge of Probate of Lee County, Ala., in Deed Book F. F. page 292.

Second. All that tract or parcel of land lying and being in the County of Lee and State of Alabama, and described as follows: Beginning at a point designated by a stone post on Section 33, Township 18, Range 30 on the north and south division line between the lands of Mrs. Kesiah Long and The Columbus Water Works Company's land, purchased by Frank McElvy; the said starting point being 997 feet 5 inches north 4 degrees west from the intersecting corner of the lands of said Kesiah Long and the Columbus Water Works Company's land; this corner being on the line between Section 4, Township 17 and Range 30; and Section 33, Township 18, Range 30, and running from the above named starting point as follows: North 36 degrees 55 min. west, 147 feet 9 inches; thence north 64 degrees 50 min. west 544 feet; thence north 75 deg. 15 min. west 137 feet; thence north 1 deg. 25 min. east 332 ft.; thence

37 north 37 deg. 10 min. west 298 ft. 5 in.; thence north 25 deg. 40 min. west 202 ft. 3 in. thence north 47 deg. 35 min. west 185 ft. 5 in.; thence south 84 deg. 15 min. west 95 ft. 3 in.; thence south 36 deg. 15 min. west 123 ft. 4 in.; thence north 40 deg. 50 min. west 167 ft. 3 in.; thence north 4 deg. west 143 ft.; thence south 52 deg. 30 min. east 34 ft. 3 in.; thence north 86 deg. 30 min. east 89 ft. 6 in.; thence north 84 deg. 55 min. east 158 ft. 4 in.; thence south 86 deg. 30 min. east 88 ft.; thence south 64 deg. 25 min. east 116 ft. 3 in.; thence south 58 deg. 45 min. east 176 ft. 3 in.; thence south

6 deg. east 51 ft.; thence north 47 deg. 15 min. east 231 ft. 3 in.; nence north 27 deg. east 130 ft. 8 in.; thence south 16 deg. 30 min. ast 160 ft. 8 in.; thence south 18 deg. 25 min. west 136 ft.; thence outh 12 deg. 15 min. east 211 ft. 7 in.; thence south 43 deg. 30 min. ast 598 ft. 2 in.; thence south 44 deg. 15 min. east 235 ft. 5 in.; nence south 22 deg. 15 min. west 125 ft. 3 in.; thence south 86 deg. est 90 ft.; thence south 4 deg. east 322 ft. 7 in. to place of begin- ing, said tract or parcel of land containing 16.54 acres of land, eing a part of the south half section of section 33, Township 18, ange 30 in originally Russell, now Lee County, State of Alabama. his line was run upon a magnetic variation of 4 deg. Which tract as conveyed by Kesiah Long to the Columbus Water Works Com- any by deed dated the ninth day of July, 1883, and recorded in the ffice of the Judge of Probate of Lee County, Ala., in Deed Book I. M. page 354.

(In the above description the Frank McElvy land referred to is ne first above described tract; McElvy sold to Paul Jones and Paul ones to the Water Works Company.)

Third. The tract known as the Holland lands or Third purchase, tuated in said Lee County below first reservoir, which is described as follows: The same being the whole and entire interest in 8 and to the following described land: Beginning at a point to be designated by a marble post marked C. W. W. Co. on the ownship line between Townships No. 17 and No. 18 and on the orth line of Section 4, Township 17 and Range 30, Lee County, labama; thence running east along said line 2100 feet; thence outh 1400 feet; thence west 2100 feet; thence north 1400 feet to the lace of beginning; these lines being run upon a magnetic variation f 4 deg. This parcel of land being a part of the north half of sec- on 4, Township 17 and Range 30 in originally Russell now Lee ounty, Alabama; and containing 67½ acres of land, more or less; hich tract was conveyed by Hettie Holland to the Columbus Water Vorks Company by deed dated 3rd day of August, 1883; and re- orded in the office of Judge of Probate of Lee County, Alabama, in eed book M. M. page 442.

Fourth. The tract known as the Velati Farm, or Fourth purchase, pper Reservoir, which is described as follows: "The south half of ection 32, Township 17, Range 30, except 45 acres more or less off ne northwest corner of said half section formerly belonging to Dr. rquhart and except 10 acres, more or less, off the southwest corner f said half section; said tract containing 270 acres of land, more or ss, lying and being in the County of Lee and State of Alabama; hich tract was conveyed by J. F. Holland and F. M. Holland his ife on the 26th day of Jan. 1884, to The Columbus Water Works ompany by deed, which deed is recorded in the office of Judge of robate of Lee County, Ala., in deed book O. O. page 267.

Fifth. The tract known as the Thompson land, Fifth Purchase, Upper Reservoir, which is described as follows: Beginning at 9 a stone post midway the section line between Sections 32 and 33 at the southeast corner of the northeast quarter of Section 2; thence running (magnetic variation north 2 deg. 45 min. west)

along said section line north 2 deg. 45 min. west 170 ft.; thence south 87 deg. 15 min. west 190 ft.; thence south 62 deg. 30 min. west 403 ft.; thence north 87 deg. 15 min. east 565 ft. to place of beginning; being part of the northeast quarter of section 32, Township 18, Range 30, in Lee county, Alabama; and containing one and 47/100 acres of land; which tract was conveyed by Mary A. Threlkeld, G. A. W. Thompson and W. T. Thompson by deed dated the 25th day of April 1884, to The Columbus Water Works Company. Which deed is recorded in the office of Judge of Probate of Lee County, Alabama in deed book O. O. page 121.

Together with all the buildings and improvements thereon or rights, ways, waters or privileges thereto appurtenant.

And also all other real estate now owned by said party of the first part or which may be hereafter acquired during the continuance of the lien of this Deed of Trust, situated in the States of Alabama or Georgia or wheresoever the same may be situated.

And also the water works of said party of the first part with the reservoirs, machinery, plant, equipment and appurtenances, pump houses, stand pipes and buildings; and all pipes, mains, hydrants and all fixtures and apparatus connected thereto throughout the City of Columbus or in the vicinity thereof or wheresoever the same may be now owned by said party of the first part or which may hereafter be acquired during the continuance of the lien of this deed of trust.

And also all the personal property, charter rights, privileges or franchises under the laws of the State of Georgia or under the ordinances of the City of Columbus including the franchise of the party of the first part to be a corporation, and all rights of way or privileges in and through the streets, alleys, ways and public squares and over and through any private property in said City of Columbus or in its vicinity or elsewhere to lay mains, or pipes and for the erection of hydrants used or to be used for the purpose of supplying water in Columbus and its vicinity or for any other purpose now owned by the said party of the first part or which may be hereafter acquired by it during the continuance of the lien of this deed of trust.

And also all contracts made or to be hereafter made during the continuance of the lien of this deed of trust between the said party of the first part and the City of Columbus or any public institution or public officers or commissioners for supplying of water by the said party of the first part.

And also all the water rents, debts, dues, demands, choses in action and all the income whatsoever of the said party of the first part due or to be due or arising from its business of supplying water within the City of Columbus or in its vicinity or elsewhere during the continuance of the lien of this deed of trust.

To have and to hold the above described property, premises, rights, privileges, franchises, appurtenances, choses in action, assets and effects unto the said party of the second part its successors and assigns in trust nevertheless and subject to the declaration of trust, covenants, conditions, agreements, stipulations and provisions contained in the following clauses.

First clause. This deed of trust is executed to secure the payment

41 (*a.*) of the interest on such of said five hundred bonds heretofore described as shall be at any time during the continuance of the lien of this deed of trust outstanding or negotiated;

(*b.*) and of the principal of such of said five hundred bonds as shall be outstanding and negotiated;

According to the agreements contained in said coupons and bonds respectively without preference or priority between different bonds; it being undertsood that the lien of this deed of trust is to secure the payment of all interest due on any of said bonds in full prior to the payment of any principal.

And each of said bonds which may be at any time outstanding and negotiated shall be deemed equally secured by this deed of trust and by all conveyances or mortgages supplementary thereto.

And in case of entry and taking possession by the said party of the second part or in case of a sale by said party of the second part as hereinafter provided or in case of any foreclosure proceedings or in case of the appointment of any receiver and in case of the receipt of any moneys by the said party of the second part or any receiver or officer of court from any income, debts, dues or demands, collected or received by it, him or them, or from any sale of the property or things or any of them herein mortgaged or conveyed or intended so to be or hereafter conveyed by any assignment, conveyance or mortgage supplementary hereto, the cost and expenses of all kinds of said trustee in the administration of the trust, and of foreclosure and sale and of courts, officers, and receivers shall be first paid out of said moneys, and the surplus, if any shall be devoted pro rata—

42 first to pay said interest due and second said principal due and demandable without preference or priority between bonds until the whole thereof is paid, and if there should remain any surplus after paying said interest and principal of said bonds, the same shall be paid over to the party of the first part.

Second clause. So long as the party of the first part shall observe, do, keep, and perform all and singular the premises, agreements, covenants, conditions, stipulations and provisions, in said bonds and coupons and in this deed of trust contained and shall well and truly pay or cause to be paid the interest and principal of the debt evidenced and promised to be paid by said bonds and coupons at the time in the manner and at the places therein mentioned for payment thereof, it, the said party of the first part, may retain possession of all the rights, franchises, privileges, easements, estate, choses in action, property, real and personal, effects and assets hereinbefore conveyed or intended to be conveyed and may collect and disburse monies arising from any and all debts, choses in action, water rents or income whatsoever arising from its business without let or hindrance from the said party of the second part.

Third clause. And in case the said party of the first part, shall pay the interest on said bonds as the same becomes due and payable, at the time, in the manner and in the place the same is payable according to the terms of said bonds and coupons and shall well and

truly pay the principal of said bonds at the time in the manner and at the place for the payment thereof according to the terms of said bonds, and shall upon demand pay all the expenses of ad-
43 ministering the trust hereunder, and shall during the continuance of this deed of trust observe, do keep and perform all the covenants, conditions and agreements and stipulations herein contained and all things by it to be observed, done, kept, or performed, according to the terms of said bonds and coupons and of this deed of trust, then the said party of the second part shall cause this deed of trust to be released and discharged (but at the expense of the party of the first part) and all the rights, privileges, franchises, easements, choses in action, property, estates, effects and assets conveyed by these presents, shall be released from the operation of the same.

Fourth clause. But should the said party of the first part at any time make any default in the payment of the interest on said bonds or any instalment or part of any instalment thereof, in the manner, at the time or at the place when and where said interest or any instalment or part thereof, shall be due and payable according to the terms of said coupons and bonds, or should the party of the first part make any default, or neglect, or refuse, or in any manner fail, to observe, do, keep, or perform, all and singular, each and every, covenant, promise, condition, agreement, stipulation or provision in said bonds or coupons and in this deed of trust contained and by the said party of the first part to be observed, done, kept and performed, and in case such or any such default in paying said interest or such default, neglect, refusal or failure shall extend for the period of six months and a majority in interest of the holders of said bonds then outstanding shall in writing request the said party of the second part to make such sale or should the party of the first part make any default in the payment of the principal of said bonds or any
44 part thereof, in the manner at the time or at the place when and where said principal shall be due and payable according to the terms of said bonds, then in these events or either of them, it shall be the duty of the said party of the second part and it is hereby authorized and empowered, unless such default be waived as herein provided, after entry as hereinafter provided, or other entry, or without entry, by its attorney or attorneys, agent or agents, to sell and dispose of all and singular the said water works, plant, property real and personal, premises, privileges, franchises, appurtenances, equipments, easements, estate, assets and effects, whether owned by the party of the first part at the date of these presents or acquired thereafter and before the time of the sale provided for in this clause, conveyed or intended to be conveyed by these presents or by any assignment, conveyance or mortgage supplementary hereto, at public auction to the highest bidder at such time and place in the City of Columbus in the State of Georgia as it may designate having first given public notice of the time, place and terms of such sale by advertisement published not less than once a week for eight successive weeks in one or more newspapers published in the City of Columbus and Baltimore with the right to adjourn such sale or sales from time to

time in the discretion of the trustee, giving reasonable notice of such adjournment, and after so adjourning to make the sale at the time and place to which the same may be adjourned and upon a consummation of a sale upon the terms and conditions thereof to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds in law for the same in fee simple or absolutely which sale made as aforesaid shall be a perpetual bar both at law and in equity against said party of the first part and all persons lawfully claiming or to claim the said water works property,
45 real and personal, premises, privileges, franchises, appurtenances, equipments, easements, estate, assets and effects or any part thereof so sold, by, from through or under it. And after deducting from the proceeds of such sales just allowances for all expenses of said sale including attorney's and counsel fees and all other expenses, advances and liabilities which may have been made or incurred by the said trustee in operating said water works or in managing the business of the party of the first part while in possession thereof and all payments which may have been made by it for taxes and assessments and other proper charges upon the said water works and appurtenances, property and premises, rights, interests and franchises or any part thereof as well as a reasonable compensation for its own services, then to pay and to apply the same as provided in Clause First of these presents.

This provision is cumulative to the ordinary remedy by foreclosure in the Courts and this said trustee herein or its successor or successors in the trust upon default being made aforesaid in the payment of interest in the performance of the covenants and conditions herein on the continuance of said default for the period of six months, and upon the written request of the holders of a majority in value of the said bonds then outstanding and unpaid or on default in the payment of the principal of said bonds shall institute proceedings to foreclose this deed of trust or mortgage in such manner by sale under the power herein given or by suit, as the majority of the said bondholders may direct, and if no direction is given in this behalf then in such manner as to the said trustee may seem most expedient.

And in case of such foreclosure or any proceedings therefor the said party of the second part may at the commencement of
46 suit and before any plea, answer or demurrer is filed apply for the appointment of a receiver of all rents and profits, debts, dues, demands, and choses in action and the property estate and assets of the party of the first part hereby conveyed or intended to be or which it shall then possess or be entitled to or interested in; and such receiver shall be appointed without any opposition from the said party of the first part and such receiver shall be vested with all the rights, and privileges and subject to all the duties and obligations granted to and obligatory upon the said party of the second part in case of entry into possession and as specified in the Seventh Clause of this deed of trust.

And in case of a sale under the power contained in this clause or in case of a foreclosure the whole principal sum of the indebtedness

evidenced by said bonds and coupons both principal and interest shall be due, demandable and payable and such sale or foreclosure shall be to satisfy such whole sum.

Fifth clause. And it is hereby declared that the receipt or receipts of the trustee shall be sufficient discharge to the purchaser or purchasers at any sale or sales made by the said trustee under or in pursuance of any or either of the provisions for that purpose herein contained for his or their purchase money; and that such purchaser or purch-sers, his or their, heirs, executors, or administrators shall not after payment thereof and having such receipt be liable to see to its being applied for or upon the purpose and trusts of these presents or in any manner howsoever be answerable for any loss, misapplication or non-application of such purchase moneys or any part thereof; or be obliged to inquire into the necessity, expedi-
47 ency or authority of or for any such sale.

Sixth clause. And in case of any foreclosure sale, or of any sale made under any of the provisions of this deed of trust, the purchaser or purchasers thereat shall be entitled in making settlement for, and payment of, the purchase money therefor, to deliver to the then trustee, toward the payment of such purch-se money, any of the said bonds and interest coupons secured thereby, and held by such purchaser or purchasers, counting such bonds and interest coupons for such purpose at a sum not exceeding that which shall be payable out of the net proceeds of such sale to the holder or holders of such bonds and interest coupons, as his or their share and proportion in that character of such net proceeds of sale, after allowing for the proportion of payment which may be required in cash for the costs and expenses of the sale, and if such proportionate sum shall be less than the amount of such bonds or interest coupons, to make such settlement by receipting thereon for the amount to be credited thereupon.

Seventh clause. And in case of any such default in the payment of the interest or any instalment or part of any instalment of such interest on said bonds or in case of any such default, neglect, refusal or failure to observe, do keep or perform all and singular the covenants, promises, stipulations or provisions in said bonds and coupons and in this deed of trust contained as specified in Clause Fourth of these presents, and in case such default in paying said interest or such default neglect, refusal or failure shall extend for the period of ninety days or in case of a default in the payment of the principal of said bonds, then on the written request of a majority
48 in interest of the said bonds then outstanding, unless such default be waived as herein required, the said party of the second part shall enter in and upon and take possession of all and singular the above described water works, property, premises, rights, privileges, franchises, appurtenances, contracts, choses in action, assets and effects, whether owned by the party of the first part at the date of these presents of thereafter acquired conveyed or intended to be conveyed by these presents or by any conveyances supplementary hereto and each and every part thereof, and it shall be lawful for the said party of the second part on making such entry to exclude the

said party of the first part and its agents wholly therefrom and to hold and use the same, and control manage and operate by its employees, agents, servants, managers and attorneys the said waterworks, property, rights, privileges, franchises, appurtenances, choses in action, assets and effects and to conduct and manage the business of supplying water in the City of Columbus and its vicinity and to make from time to time at the expense of the trust estate, all repairs and replacements and such useful alterations, extensions, additions and improvements thereto, and to do all other matters and things which will promote the interests of the parties hereto or may seem to it, the said trustee judicious and proper and to collect and receive all water rents, rents, incomes, issues and profits and every part thereof and after deducting the expenses of operating said water works and conducting said business and paying all legitimate debts and obligations and for all repairs, alterations, extensions, additions and improvements as aforesaid, and all taxes, assessments and other proper charges on said property and premises or any part thereof as well as a just and reasonable compensation for its own services and the services of all agents, clerks and servants properly en-
49 gaged and employed, including reasonable attorney's and solicitor's fees, then to apply the moneys arising as aforesaid to the payment of the interest in arrear or which shall become due on the outstanding bonds hereby secured and to the payment of the principal of said bonds as provided in Clause First of these presents.

Eighth clause. No delay or omission of the said trustee or of the holders of the bonds secured hereby in respect of any default happening or continuing as aforesaid, to exercise the rights and powers arising therefrom as hereinbefore provided shall be held to exhaust or impair such rights and powers or be construed to be a waiver of such defaults; but it is hereby mutually agreed as a condition subject whereto the bonds secured hereby are issued and held by each successive holder that the holders of a majority in interest of said bonds at any time outstanding may by an instrument under their hands or by a resolution adopted at a meeting of such bondholders waive, or instruct the trustee to waive, any default occurring and the rights accruing therefrom on such terms and conditions or without any conditions as to such majority may seem proper; provided always, that no such action of the bondholders shall extend to or be taken to affect any subsequent default or impair the rights resulting therefrom, or to authorize any subsequent breach of any condition herein. And subsequent defaults may be waived in the same way, but without affecting defaults thereafter occurring or authorizing breaches of conditions.

Ninth clause. The trustee shall be entitled to be reimbursed for all proper outlays of every sort or nature by it incurred in the
50 discharge of its trusts, and to receive a reasonable and proper compensation for any duties that it may at any time perform in the discharge of the same; and all such fees, commissions, compensations and disbursements shall constitute a lien on the mortgaged property and premises.

Tenth clause. In no event shall any expense of any kind fall

upon said trustee but all its expenses and costs, including the fees and charges of attorneys, and agents employed by it, in good faith, in the administration of the trusts herein contained, shall be paid by the party of the first part.

Eleventh clause. The trustee shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case, for the act or default of any agent or attorney or employee selected with reasonable discretion.

Twelfth clause. Should any suit or other proceeding be brought against the trustee, by reason of any matter or thing connected with the trusts, hereby created, or by reason of its being such trustee, it shall be under no obligation to enter any appearance by counsel, or in any way appear in and defend the said suit or other proceeding, until indemnified to its satisfaction for so doing, but it may nevertheless appear and defend the same without indemnity, if it shall elect to do so, and in such case it shall be compensated therefor from the trust fund.

Thirteenth clause. In case at any time it shall be necessary
51 or proper for the said trustee to make any investigation respecting any facts preparatory to taking or not taking any action, or doing or not doing anything as such trustee, the certificate of the party of the first part under its corporate seal attested by the signature of its president and the affidavit of one or more directors shall be sufficient evidence of such fact to protect the trustee in any action that it may take by reason of the supposed existence of such fact.

Fourteenth clause. It shall be no part of the duty of the party of the second part to see to the recording of this indenture as a mortgage or conveyance of real estate, or to the filing thereof as a chattel mortgage or renewing such mortgage, or to do any other act which it may be suitable and proper to be done for the continuing of the lien of this indenture, or for giving notice of the existence of such lien; nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance.

Fifteenth clause. The right of action under this indenture is vested exclusively in the trustee, and under no circumstances shall any bondholder or any number of bondholders have any right to institute an action or other proceeding, on or under this indenture, for the purpose of enforcing any remedy herein and hereby provided, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement; and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustee according to
52 its sound discretion, but the trustee shall be under no obligation to institute any such suit or to take any proceedings under this indenture until it shall be indemnified to its full satisfaction for all the expenses and costs of every kind, and also for all possible claims for damages.

Sixteenth clause. The party of the second part, as trustee or otherwise, shall be under no obligation to recognize any person or persons,

firm or corporation, as holder or holders, owner or owners, of one or more of the bonds secured hereby, or to do or to refrain from doing any act pursuant to the request or demand of any person or persons, firm or corporation, professing or claiming to be such holder or owner, until such supposed holder or holders shall produce the said bonds, and deposit the same with the trustee, and shall indemnify and save harmless the trustee, to its full satisfaction, from any and all costs and expenses, outlays and counsel fees and other reasonable disbursements for which it may become liable or responsible on proceeding to carry out such request or demand.

Seventeenth clause. And the said trustee or any successors in this trust shall have the power to release from the lien of this deed of trust any land, machinery or other property, which may no longer be necessary or useful for the purposes of the party of the first part but only on condition that such property be forthwith replaced by other property of equal value and subject to the lien of these presents.

Eighteenth clause. The said party of the first part for itself its successors and assigns and so as to bind all persons who may
53 claim through or under it as assigns, junior encumbrancers, lien holders or otherwise doth hereby irrevocably waive the benefit or advantage of any or all valuation, stay, appraisement, redemption or extension laws, and of all laws requiring mortgages, liens, hypothecations, deeds of trust, or other securities for money to be foreclosed by action therefor, now existing or which may hereafter exist in the State of Georgia or any other State wherein the property to be sold hereunder or any part thereof, may at the time of sale be situated, or where the said sale may take place, which but for this stipulation herein might prevent or postpone the sale of said premises, property, rights and interests to the purchaser under the power and in compliance with the provisions herein provided.

And the said party of the first part does hereby covenant with the said party of the second part, the said trustee its successor or successors in the trust hereby created, that it will not in any manner set up or seek to take the benefit or advantage of any such valuation, stay, appraisement, redemption or extension laws.

Nineteenth clause. Said party of the first part for itself and all other persons hereafter claiming through or under it or who may at any time hereafter become holders of liens junior to that of these presents, hereby expressly waives and releases all right to have the assets comprised in the security intended to be created by these marshalled upon any foreclosure or other enforcement thereof, and it is expressly hereby agreed and declared that the trustee herein and any court in which foreclosure of these presents or administration of the trust hereby created is sought shall have the right to sell the entire property of every description comprised in or sub-
54 ject to the trusts of these presents as a whole in one single lot if it shall in its discretion think fit. And a majority in interest of said bonds, may by instrument in writing direct the trustee or petition the said court to sell the said property in such manner.

Twentieth clause. And the said party of the first part doth

covenant, bargain and agree to and with the said party of the second part, as follows:

A. That it, the said party of the first part shall well and truly pay the holders of the bonds hereby secured the interest thereon semi-annually as the several coupons attached to said bonds shall mature and at the time and place therein specified, and at the maturity of said bonds shall pay off and satisfy fully the principal and interest of said bonds without reduction or rebate from any cause whatever.

B. That it, the said party of the first part will do and perform all acts and things promises and covenants in any article or clause of this indenture on its part to be done, performed and kept.

C. That there is no encumbrance on any of its property, rights, choses in action or assets hereby conveyed or intended to be conveyed.

D. That at all times during the continuance of this deed of trust it, the party of the first part will promptly and before any penalty or forfeiture shall attach in due season pay or cause to be paid all taxes, levies and assessments laid upon it or its property or assets by any lawful authority.

And in case of failure to do so the said trustee may pay the same and add the same to the amount secured by this deed of trust
55 and the same with six per cent. interest shall be preferred to the debt evidenced by said bonds and coupons, but such payment shall not be considered a waiver of any forfeiture under the provisions of this deed arising from the breach of the covenant to pay said taxes.

E. That it, the party of the first part will at any time in the future upon demand at its own expense execute and deliver and record (if proper for record) all such further and other conveyances, assignments, mortgages and supplementary deeds of trust of the rights, privileges, franchises, easements, choses in action, property real and personal, effects and assets used or to be used in the supply of water in the City of Columbus and its vicinity, now owned by it whether covered by this conveyance or not and of any rights, privileges, franchises, easements, choses in action, property real and personal, effects and assets which it may at any time hereafter acquire and in anywise connected with the property hereby conveyed and to be used for the purposes above specified, as the party of the second part may demand to subject the same to the lien of this deed of trust and such further and other conveyances, assignments, mortgages and supplementary deeds of trust of the rights, privileges, franchises, easements, choses in action, property real and personal, effects and assets used or to be used in the supply of water in the City of Columbus and its vicinity, now owned by it whether covered by this conveyance or not, and of any rights, privileges, franchises, easements, choses in action, property real and personal effects and assets which it may at any time hereafter acquire and in anywise connected with the property hereby conveyed and to be used for the purposes above specified, as the party of the second part may demand to subject the same to the lien of this deed of trust and such further and other conveyances, assignments, mortgages and supplementary deeds of trust shall be deemed
56 a part of this instrument and form together one security for the payment of the debt evidenced by said bonds and coupons.

F. That the said party of the first part, will not commit or suffer to be committed any waste of its property or assets; that it will not release any contract it now has with the City of Columbus, or any person or persons whereby the income of the party of the first part shall in any way be diminished either annually or in gross without the consent of the party of the second part.

G. That during the continuance of this deed of trust the said party of the first part will not do or suffer to be done any act or acts whereby the security of the said bondholders shall be in any way or manner or in any amount impaired, and that the said party of the first part will at all times, maintain, preserve and keep its water works, pumps, machinery, reservoirs, piping, hydrants and equipments in good repair, working order and condition and supplied with all the machinery, equipments and appliances for providing water to the City of Columbus and vicinity and shall and will from time to time make all needful and proper repairs, renewals and replacements and useful and proper alterations, additions, betterments and improvements.

H. That during the continuance of this deed of trust, it, the party of the first part, will not suffer or permit any lien of mechanics or material men or others of any kind or any incumbrance of any kind upon any of the property to be hereafter acquired for extending, renewing, or improving its water works which shall be a prior lien to the lien of this deed of trust or before the execution of an instrument subjecting the same to this deed of trust.

57 I. That the said party of the first part will cause the buildings, machinery and other property conveyed or intended to be conveyed by these presents, which may be liable to be destroyed by fire, to be insured to the amount of three-fourths at least of their value and such insurance shall be continued by renewals from time to time, and in case of loss to apply the monies arising from such insurance to the renewal, rebuilding and restoration of the works and such renewals and restorations or rebuildings are to be subject to the lien of these presents.

Twenty first clause. The said trustee, the said party of the second part, hereby promises and agrees:

A. That in no case will it deliver or certify any of the bonds hereby secured, except in conformity with the provisions of this instrument.

B. And the said party of the second part hereby stipulates and agrees that it will safely keep the one hundred and seventy five bonds numbered consecutively from number three hundred and twenty six (326) to number five hundred (500) both inclusive to be deposited with it according to the resolutions hereinbefore set forth and the terms of this instrument and will not issue or deliver the same or suffer the same to become outstanding except for the use and purposes and in the manner expressed in this deed of trust and said resolutions.

Twenty second clause. And it is further stipulated and agreed that in case the said trustee shall desire, for any reason, to surrender the trust conferred upon it by this instrument, it may at any time

58 do so, and may nominate its successor, and if the person so nominated is a fit and proper person, the said party of the

first part shall, by resolution of the board of directors, confirm the said nomination and certify the same to the party of the second part; and in such case the said party of the second part may transfer the trust, by deed properly executed, to the successors so chosen, or the party of the second part may in its discretion in the first instance, or in case the parties fail to agree, and with or without the consent of the party of the first part, apply to any court then having equity jurisdiction in the County in which the mortgaged property, or any part thereof, shall then be situated, either a court of the United States or of the State of Georgia, for the appointment of such successor, and such court may appoint a successor to the party of the second part; and it is agreed and stipulated that the successor so appointed, whether by act of the parties or by a court upon accepting the same, shall succeed to all the interest, rights and privileges, and be subject to all the duties and obligations pertaining to the party of the second part hereto, and to all intents and purposes become and be the party of the second part to this instrument and any subsequent or supplementary assignment, conveyance or mortgage, the same as if originally named therein.

Twenty third clause. And it is understood and agreed that all the conveyances, covenants, conditions, agreements, stipulations and provisions herein mentioned and contained apply to and bind the successors and assigns of the respective parties as fully as the parties themselves.

Twenty fourth clause. The recitals herein contained are made on behalf of the party of the first part, and the party of the sec-
59 ond part assumes no responsibility as to the correctness of any statement therein contained.

In witness whereof the said The Columbus Water Works Company and the said The Mercantile Trust and Deposit Company of Baltimore have hereunto caused their respective common or corporate seals to be affixed, dated the day and year first above written.

THE COLUMBUS WATER WORKS COMPANY,
By H. H. EPPING, *President.*
W. S. TOWNSEND, *Treasurer.*

[Seal Columbus Water Works Co.]

Signed, sealed and delivered in the presence of us:
H. C. MERRICK,
SAMUEL L. TAYLOR.

As to the signatures of H. H. Epping and W. S. Townsend and the Columbus Water Works.

THE MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE,
By JOHN GILL, *President.*
L. C. FISCHER, *Treasurer.*

[Seal Mercantile Trust and Deposit Co. of Baltimore.]

Signed, sealed and delivered in the presence of us:
THOS. B. HORWITZ,
G. EVETT REARDON,
A Commissioner for Georgia in Maryland residing in Baltimore City, as to the signatures of John Gill and L. C. Fischer, President and Treasurer, and the Mercantile Trust and Deposit Company of Baltimore.

(Acknowledgments for the States of Georgia and Alabama.)

THE STATE OF ALABAMA, *Lee County:*

I, W. C. Robinson, Judge of Probate Court, for the County of Lee and State of Alabama, do hereby certify that the annexed deed of conveyance from the Columbus Water Works to the Mercantile Trust and Deposit Company of Maryland was filed in my office for
60 record on the 20th day of January, A. D. 1891, and was recorded on the 21st day of January, A. D. 1891, in Record of Deeds, Vol. A-13, on page 149.

Given under my hand on this, the 21st day of January, A. D. 1891.
W. C. ROBINSON,
Judge of Probate.

Filed in office this January 22nd, 1891, at 10.20 a. m.
JOHN C. COOK,
Clerk Supr. C. M. C. Ga.

GEORGIA, *Muscogee County:*

Clerk's Office of the Superior Court of Said County.

I, John C. Cook, Clerk of said Court do hereby certify that the annexed deed of conveyance from the Columbus Water Works to The Mercantile Trust and Deposit Company of Maryland was filed in my office for record on the 22nd day of January, 1891, and was recorded on the 22nd day of January 1891 in Record of Mortgages Vol. G. folio 500 to 522 inclusive.

Given under my hand and seal of said court attached this January 23rd, 1891.

JOHN C. COOK,
Clerk S. C. M. C. Ga.

[Seal Superior Court Muscogee County, Georgia.]

61 EXHIBIT "B."

STATE OF GEORGIA, *County of Muscogee:*

Contracting Parties.

This is a contract made and entered into this 7th day of October, A. D. 1881, between Thomas R. White, of the city of Philadelphia, State of Pennsylvania, and such other persons as may be associated with or incorporated with him, and the Mayor and council of Colum-

bus, for the construction and operation of an effective system of water works for the supply of the city with water for the various uses required.

Thomas R. White, on his part, agrees to furnish and supply as hereinafter stated:

Real Estate and Water Rights.

I. All the real estate, rights of ways, water rights and water, that shall be found requisite for the successful prosecution and operation of the water works.

Buildings, Dams, &c.

II. To supply buildings, dams, embankments of ample size and strength, good and durable quality, that may be required for the works.

Storage Reservoir—Elevation.

III. A storage reservoir for water, having an available capacity for the storage and supply of not less than 125,000,000 of gallons of water when filled, so situated that the surface of water in such storage reservoir shall, when full stand at an elevation of not less than 100 feet above the floor of the city market house; and if practicable to have an elevation of 107 feet or more.

62 Supply Main.

IV. A water supply main of cast iron pipe, leading from the storage reservoir to the city, of ample capacity for water supply; which, in the beginning, shall be of 12 inches internal diameter, and shall supply the street mains at the pressure due to the elevation. It shall be properly placed for the purpose intended.

Distribution System.

V. The distribution system in the city shall, in the beginning, consist of 5 miles of street mains, of 12, 10, 8, 6 and 4 inch internal diameter, to be laid in such streets as Thomas R. White may select, with the consent of a special committee appointed by the city council; particular reference being had to such a mode of distribution as shall give the greatest amount of fire protection to the city, and the distribution of the largest amount of water to consumers. The street mains shall be of the best cast iron, coated with coal tar varnish, and capable of standing a hydrostatic pressure of three hundred pounds to the square inch.

Stop Valves.

VI. The flow of water in the street mains shall be controlled by thirty (30) valves, distributed on the various sizes of pipes, at appropriate distances.

Fifty Double Hydrants for Fire.

VII. Fifty (50) double hydrants shall be placed on the original five miles of street distribution, making in all one hundred (100) hose connections. Both hydrants and valves to be first-class workmanship. Hydrant connections to be four (4) inches and
63 water ways of hydrant four (4) and four and one-half (4½) inches. Proper provision shall be made to guard against freezing in case of operation in use.

Drinking and Park Fountains.

VIII. Five (5) public drinking fountains shall be erected at such points on the line of distribution as representatives of the council may direct and one first-class park fountain in the public park.

Size of Street Mains.

IX. The size of street mains shall be ample for supply to consumers and for fire protection through hydrants. The capacity for distribution and supply to various mains in streets to equal sizes given in plans for pipes, submitted to special committee of council previous to execution of this contract.

Water Supply.

X. The source of water supply shall be determined by Thos. R. White, he guaranteeing, however, that the supply of water, both, in quality and amount, shall be wholesome, constant and amply sufficient to meet the wants of the city, and private consumers, for future and present requirements.

Filter for Water Distribution.

XI. Within the storage reservoir, and surrounding the supply main leading to the city, shall be constructed of masonry, two circular concentric walls, arranged in annular positions, about twelve (12) feet distant from each other, and having an internal diameter for the inner wall of from forty (40) to fifty (50) feet, the outer having about twenty-four (24) feet greater diameter. These
64 walls to form a structure for containing between them, gravel, sand and filtering materials, through which all water supplied to the water main shall pass before being distributed to the city.

Vegetable and Unwholesome Matter to be Removed.

XII. In constructing the storage reservoir all trees, stumps, roots, grass, alluvial deposits, vegetable and unwholesome matter shall be removed from the space to be occupied by water. Excavations and embankments shall be made about the margins of the reservoir such as will avoid all thin edges to the water, with reservoir filled, and

cause marginal depths of not less than four (4) feet of water. After the completion of the reservoir, and the use of the water from the same by the city, it shall be kept from grass, weeds, vegetation of all kinds, aquatic, or otherwise; and all proper and reasonable provisions made for cleanliness and purity. The filtering material surrounding the supply main shall be kept in good condition and cleanly.

Contaminated or Unwholesome Water—Experts.

XIII. Should the water supply to the distribution ever become contaminated, or unwholesome, from any cause, upon notice being given by the proper city authorties, Thomas R. White agrees to make all provisions practicable for improving the quality; and if, at any reasonable time after such notice, the water supply is not of wholesome quality, to be determined by three scientific experts (one to be selected by the city, one by Thomas R. White and the two to select a third), the city authorities may issue orders limiting its use, or the entire cutting off of the water from the street mains, and reserve the use for fire purposes only. The expenses of such experts and examination to be paid by Thomas R. White or the city, whichever may be decided against; and if no decision, each to pay its expert, and both to pay the third.

Franchise—Rental of Fire Hydrants.

XIV. The Mayor and council are to grant a franchise for the exclusive privilege of maintaining and operating the works for a period of thirty (30) years; or until such time as they may be purchased by the city; and during such time to rent from Thomas R. White the fifty (50) double fire hydrants at an annual rental of eighty (80) dollars each, equal to four thousand ($4,000) dollars per year—payable quarterly; and on future extensions the rate shall be seventy five (75) dollars per hydrant; but whenever the number of hydrants shall exceed ten (10) per mile, on any one mile of pipe, there shall be a discount of ten per cent. for each additional hydrant on said mile of pipe. In the primary distribution of the fifty hydrants on the line of street mains reference shall be had to the value of property contiguous, and a number of hydrants greater than ten may be placed on a mile of pipe without this reduction in price per hydrant, until additional hydrants, beyond fifty (50) are placed on the original five miles of pipe, when such reduction shall occur on one hydrant for each such addition.

Payment of Water Rents.

XV. In order to make provisions for the payment of water rents, the Mayor and council, in making appropriations for the fire and sanitary departments, shall appropriate a sum sufficient to pay the annual rental of the water works, and the Mayor and council shall

receive in payment for any taxes due the city of Columbus
63 the due coupons of any bond issued by Thomas R. White, to an amount not exceeding the rental due by the city to him in any one year; and the coupons thus taken shall be received by him as cash in payment of said rentals.

Rates to Private Consumers—Or Annual Charges.

XVI. Thomas R. White may charge and collect from private consumers not to exceed the following rates: For an average daily consumption of less than five hundred (500) gallons, five (5) cents per hundred gallons; from five hundred (500) to two thousand (2,000) daily average, four (4) cents per hundred gallons; from two thousand (2,000) to five thousand (5,000) daily average, three (3) cents per hundred gallons; over five thousand (5,000) daily average, two and a half (2½) cents per one hundred gallons, or, instead of above rates, annual charges may be made to consumers for use, based on consumption, prices not to exceed those mentioned in this section.

Free to Water City in Lieu of City Taxes.

XVII. The city shall have the right to free use of water for four sprinkling carts, or wagons, to be taken from the line of distribution, for engine practice, for the park fountain, for the drinking fountains, for the court house or city hall, engine houses and public schools, and in consideration of this use of water the city shall pay Thomas R. White a sum annually equal to the city taxes on the water works property, stocks, bonds and franchises due said city.

Charges to City for Water.

XVIII. The price to be paid by the city for water, other than for sanitary purposes, and that supplied in lieu of taxes, and not
67 otherwise herein provided for, shall be at a rate not exceeding two (2) cents per one hundred gallons for the amount actually used.

Filling Public Cisterns.

XIX. The city authorities may select any number of public cisterns, which they may desire to be kept supplied with water from the fire hydrants, and such cisterns, when so designated, may be, from time to time, filled by the fire department, by means of hose, for the purpose of extinguishing fires, and for engine practice; and for water thus furnished the city shall pay an annual rental of fifteen (15) dollars for each cistern so designated, or the water may be paid for at the rate of two cents per one hundred gallons.

Flooding Streets or Sewers—Charges—Rates.

XX. Whenever, in the opinion of the proper city authorities, for sanitary purposes, it shall be deemed expedient to wash or flood the

streets, drains, ditches or sewers, contiguous to fire hydrants, on one day's notice being given Thomas R. White, any fire hydrant may be used for such purposes, directly or by means of hose, or connection; provided such use is not beyond the capacity of the works to supply. For each fire hydrants so used, the city shall pay forty (40) cents per hour for water supplied through each hose, and one dollar and forty ($1.40) cents if supplied directly from fire hydrants.

Reservation to City of Pipes, &c., Now in Use.

XXI. The Mayor and council reserve the right to the undisturbed use of the four-inch water pipes, connections and attachments, now located on Broad, Randolph and Front streets, for fire pur-
68 poses only, the supply of cisterns and engine practice. Said water pipe not to be used for other water supply, or street sprinkling, after the completion of the water works, except with the consent of Thomas R. White.

Interruption of Supply.

XXII. Should Thomas R. White find it necessary at any time to cut off the water from any or all of the supply mains, deductions in charges for water supplied shall be made, both to the city and consumers, so deprived of its uses, or benefits, equal to double what would have been due during such time, to Thomas R. White had not such interruption in supply occurred; provided that a temporary stoppage in the supply, not exceeding twelve (12) hours' duration, at any one time, for the purpose of repairing, extending or tapping water mains, shall not be considered an interruption for rebate.

Depth for Pipes in Ground.

XXIII. Water mains and pipes located in streets shall be placed an average depth of not less than three (3) feet below the surface. Fire hydrants, valves and attachments shall be properly guarded against freezing; valve wells properly guarded, both for safety of the public and the proper operation of the valves.

Uniform Hydrants—Uniformity of Valves.

XXIV. All hydrants for attaching city regulation fire hose, both public and private shall be uniform in size of openings, the threads on the same cut to fit couplings on hose now in use by the fire department. All attachments for opening hydrant valves to be of uniform size, relative opening and closing. The operating heads
69 or squares of all stop valve stems in the water main system shall be uniform size, relative to means of opening.

Direction of Opening Uniform.

Every valve of every description, whether hydrant, gate or stop valve, shall have a uniform direction of rotation in opening said valves, namely: To turn against the sun in opening, and to close by the reverse direction of rotation.

Private Fire Hydrants—Annual Rentals.

XXV. Any citizen or citizens having property interest contiguous to the line of any street main may have a private hydrant, uniform in construction and details with those rented by the city of Thomas R. White, placed at or near the street line of sidewalk, (this location to be with approval of the city council) or on the premises, said cttizen or citizens paying to Thomas R. White the full cost of purchasing and placing the same, if placed by him, or cost of any portion of same so placed by him, and paying in advance an annual rental of $25 for single, or $40 for double hydrants. Such private fire hydrants to be used for fire purposes only, except by special arrangement with Thomas R. White. Private fire hydrants thus provided, if located on streets, may be used by the city fire department for extinguishing fires contiguous; preference being always given for protection of property belonging to subscriber for the hydrants. On failure of such subscribers for private hydrants to pay on demand in advance the charges for rental on the same, Thomas R. White may cut off the water, and the ownership of so much of the hydrants and attachments as is located on the street, revert to Thomas R. White.

70 Rental of Hydrants After Fifteen Years.

XXVI. After the expiration of the term of fifteen (15) years, succeeding the acceptance by the city of the water works, under this contract, if at that time the city does not become the purchaser of the same, the annual rental charges to the city for all fire hydrants thereafter, on all future extensions, shall be reduced to one-half the prices now agreed upon; but the original rates shall be continued on all hydrants, on the distribution existing at that date.

Insufficient Water Pipes.

XXVII. Whenever the consumption of water on the line of any street main is so great as to reduce the pressure between the hours of 9 and 10 o'clock a. m., and 1 and 2 o'clock p. m., below thirty-two pounds to the square inch, said water main shall be deemed of insufficient capacity, and shall be replaced by Thomas R. White with pipes, mains, or connections, of sufficient size to give the pressure above named; the level of the market house to be taken as the index for levels and pressures.

No Pipe Less Than Four Inches.

No water main of less than four (4) inches diameter shall be used in the distribution system.

Extension of Water Mains.

XXVIII. Thomas R. White obligates himself to extend mains wherever he shall be assured of a permanent annual income of $700

per mile of pipe, or $150 a year on a line of 1,000 feet, or $100 on a line of 600 feet.

These incomes when the pipes laid may be of four (4) inches diameter, with fifty (50) per cent. additional assured income when 6 inches is to be laid, either direct or indirectly, to supply
71 the same in lengths not exceeding those mentioned.

Location of Fire Hydrants.

XXIX. The fire hydrants shall be located along the streets where the pipes are laid, and their location shall be with the approval of a special committee appointed by the council.

Interferences.

XXX. In laying water mains, service or other pipes, should existing positions of gas or other pipes, sewers, public or private improvements, present obstructions to laying the same, the determination as to position and rights shall be vested in the city council relative to water mains, and Thomas R. White shall conform to this decision.

Relaying Water Pipes.

XXXI. Whenever, owing to change of grades of streets, crossings or public improvements, water mains or pipes have to be relaid, the work of so doing shall be promptly executed at the expense of the city.

Use of Streets—Obstructions and Streets.

XXXII. Previous to laying water pipes on any streets, Thomas R. White shall have the right to distribute the sections of pipes and fittings on the surface of such street, and occupy for a reasonable time so much of the street as shall be required for the same; but in so doing due regard for public convenience shall be had and the least practical obstructions to the streets, crossings and private ways. Whenever undue obstructions are so presented, on notice being given by the proper city authorities, the same shall be removed.

72 Public Convenience—Public Safety.

XXXIII. In excavations, embankments and incidents to laying water or service pipes, due regard to public and private convenience shall be observed, and the least practicable obstructions prevented. When practicable, crossings and passages shall be provided for vehicles and persons. In excavating ditches for laying water pipes and in the use of streets for distributing the sections of pipes previous to laying and the like, due regard to public safety shall be observed, and Thomas R. White shall use such safeguards against accidents in the public use of streets, sidewalks, crossings and private ways, both during the day and night, as will avoid endangering life or limb of citizens or animals.

Damages to Streets—Negligence.

XXXIV. When damage to streets, etc., occurs from leakage or the breakage of mains or fire hydrant connections or service pipes in streets, the same shall be promptly repaired by Thomas R. White, at his own expense, unless such damage shall be caused by the negligence or wilfullness of the fire department, or other city employees.

Damages.

XXXV. Thomas R. White shall, at all times, save and keep the city harmless from all damages that may arise from excavating or filling the streets in the construction and maintaining the water works.

Streets Restored.

XXXVI. After the use of streets and highways for laying pipes and placing hydrants, the same shall be restored, as near as practicable, to as good condition as before such use.

73 Public Water for Private Use.

XXXVII. Public fountains are not to be used for private purposes, neither other public water, except by the joint consent of the city and Thomas R. White, except, also, as intended in this contract.

Hitching Posts—Illicit Uses and Malicious Mischief.

XXXVIII. The mayor and council agree to enact an ordinance making it a misdemeanor, punishable by fine not exceeding ten ($10) dollars for each offense, for any person to make use of a public or private fire hydrant as a hitching post for horses, mules or other animals, and will also protect by legislation, valves and hydrants against illicit uses and malicious mischief.

Additional Legislation.

XXXIX. The Mayor and council shall aid in procuring such additional State and municipal legislation as may be requisite to protect the rights and property of Thomas R. White.

Works to be of Ample Capacity.

XL. The proposed works shall be built in the most substantial manner, and of the best materials, and on such a scale as to permit the extension of the pipes and an enlarged supply for the future without remodeling or altering the machinery or street mains for many years to come, under ordinary conditions.

Certified Copies of Contract.

XLI. The Mayor and council will authorize the city clerk to furnish Thomas R. White certified copies of this
74 contract, or any portion of the same, to whatever number may be desired, when so requested.

Purchase of Water Works After Fifteen Years—Arbitration—Purchaser Assuming Obligation.

XLII. The Mayor and council shall have the right at the end of fifteen (15) years from the completion of the works to buy the same, with all the rights, franchises and property belonging thereunto, at a price that may be mutually agreed upon by the parties, or the valuation may be ascertained by three disinterested parties, non-residents of Columbus, or the county of Muscogee, and one of whom shall be a well known hydraulic engineer—one of the said parties to be chosen by the city, one by Thomas R. White, and these two to select a third. When these three persons shall declare the value of the water works, the city shall pay the sum named, with ten (10) per cent. added to the amount for which the works have been valued; and the city shall, in this purchase, assume all the obligations of Thomas R. White, the lawful acquittances of which shall be received by Thomas R. White as a part of the cash payment of the declared value of the water works. These obligations include such as are for operating, maintaining and extending the same, the duties incident thereto. In assuming money obligations for indebtedness, or choses in action, due from Thomas R. White to others, the same shall be in lieu of cash payments to equal amounts, and no obligation to assume money liabilities greater than the value to be paid by the city.

May Decline Purchase.

But the Mayor and council shall have the right to decline the purchase of the works, after the value may have been declared, upon the payment by them of the cost and expenses of the arbitration.

75 Right to Purchase Every Fifteen Years—Notice.

In the event of the city not making the purchase, the rights and privileges of Thomas R. White shall continue in force until final purchase of the works by the city, and the right to purchase shall enure to the city every fifteen (15) years; but in every case it shall give to Thomas R. White twelve (12) months previous notice of its intention to purchase.

Defective Plumbing.

XLIII. Whenever, by reason of defective plumbing, workmanship or material, used by consumers in fitting, considerable unnecessary water waste shall occur on the premises, after due notice being

given by Thomas R. White, he may cut off the water from such consumer until the proper repairs are caused to be made.

Putrid Water on Private Property—City May Order Supply Cut Off.

XLIV. In the use of water by consumers, should waste or drain water from any premises be allowed to flow or waste on a private property, and become obnoxious, stagnant, putrid or uncleanly; if, after due notice being given by the proper city authorities to such consumer, the obnoxious or improper conditions are allowed to remain, the city may, upon notice to Thomas R. White, have the water supply to such premises shut off until the consumer shall comply with the notice and remove the nuisance.

76 Distributing Reservoir May Be Used—Not Less Than 3,000,000 Gallons Capacity—Pumps—Filtering Water—Elevation.

XLV. In the execution of this contract by Thomas R. White, should the gravity system contemplated be found impracticable, either owing to natural causes, objections, or unreasonable requirements of land owners regarding the right of way for the pipe leading to the city, a well-constructed secondary or distributing reservoir may be used of not less than 3,000,000 gallons capacity; and two full systems of pumps, operated by either water or steam power, may be used for elevating water from the storage to the distributing reservoir. Such pumps to be first class, of easy capacity of not less than 1,500,000 gallons daily, to be capable of being worked separately or together; pumping connections between the reservoirs to be twelve inches or more, and proper valves and attachments used; filtering arrangements in storage reservoir, as heretofore described. The elevation of distributing reservoir to be not less than twenty feet above storage reservoir. Such distributing reservoir to be kept well supplied with water, in good condition in every way, and all arrangements consequent to distributing reservoir being used and adopted, shall be provided by Thomas R. White.

Time for Beginning and Completing Water Works.

XLVI. After the full execution of this contract by the city and Thomas R. White, and ratification of the contract by city council, Thomas R. White obligates himself to begin material work within twenty days, and within that time to be personally present in the supervision of the same, and to continue the work, with only such intermissions as shall occur from providential causes, to completion; with a view to the full operation of the same by May 1st, A. D. 1882.

77 He will procure all necessary real estate water rights, rights of way and leasements, proceed to building the storage reservoir as early as possible; as well as the distributing reservoir, should one be found necessary. He will contract for, and ship to Columbus, within two (2) months, two thousand (2,000) feet of twelve (12) inch water pipe for use in the supply main.

Forfeiture for Failure—Revert to City.

XLVII. If the provisions of this contract for constructing the water system shall not be commenced to be *bona fide*, executed by Thomas R. White, and material progress made within thirty days following the signing and execution of this contract, or not to be completed previous to June 1st, A. D. 1882, the rights here invested by the mayor and city council in Thomas R. White shall revert to the city; and all property, real or chattel, and rights procured by him for building the water works shall be forfeited to the city; and any damage to the streets, public or private property, by reason of incomplete work, or failure to do the same properly, shall be repaired at the expense of Thomas R. White.

Holly System.

XLVIII. Should natural causes or unreasonable requirements of owners of real estate required in construction, render the building of a storage reservoir at an elevation above 110 feet impracticable then, if deemed expedient Thomas R. White may adopt what is known as the Holly system of water works in lieu of other systems. In this event a storage reservoir of not less than fifty millions gallons capacity shall be provided. Pumps and boilers of ample capacity in duplicates. Arrangements shall be made for domestic pressure, equal to not less than that due to one hundred feet elevation, and a
78 fire pressure of not less than that due to one hundred and fifty feet. Direct electric communication from fire alarm station of city to pump house, with proper arrangements for early fire pressure in case of an alarm. As far as this system can be made to conform with provisions hereinbefore set forth, it shall be done in the use of a Holly system.

In testimony whereof Thomas R. White and the Mayor and Council of Columbus have hereto set their hands and seals, the day and year hereinbefore mentioned and written.

THOMAS R. WHITE, [SEAL.]
F. G. WILKINS, *Mayor*, [SEAL.]
JOHN HILL, [SEAL.]
R. B. MURDOCH, [SEAL.]
W. R. BROWN, [SEAL.]
J. A. SHINGLEUR, [SEAL.]

Witnesses as to signature of Thomas R. White:
JOHN N. BARNETT.
B. H. HUDSON.

79 EXHIBIT "C."

COLUMBUS, GA., *Oct.* 31, 1882.

To the Honorable Mayor and Council of the City of Columbus:

GENTLEMEN: In behalf of Columbus Water Works Company the undersigned begs leave to inform your honorable body that in ac-

cordance with the contract made between yourselves and Mr. Thos. R. White, and subsequently transferred to our company, we have completed the system of water supply for your city, and reservoir is amply provided, and the mains are now full, and the water ready for distribution and use, under the terms of said contract. We feel that we are justified in saying that the work has been done by our company in the most complete and substantial manner, in which neither time, labor nor expense has been spared, and in adding our assurance that the water supplied will be wholesome, abundant and lasting; and we trust that your honorable body, as well as the citizens of Columbus generally, will find everything connected with our work as satisfactory as we have endeavored to make it so. The magnitude and substantial character of the work, which has greatly increased the expense of the undertaking to the company, will we trust fully compensate for the delay in its completion.

The company desires that your honorable body may take some official action signifying your acceptance of the work, and the adoption of such suitable measures as may be requisite for the more fully carrying into effect the provisions of said contract.

All of which is respectfully submitted.

B. F. ARCHER, *President,*
Columbus Water Works Company.

80 EXHIBIT "C" CONTINUED.

It being stated that the filters of the reservoir differed from the one prescribed in the contract, Mr. Thos. R. White was sent for, who explained that the one built was an improvement over the one described in the contract for the reason that it could be easily taken out and cleaned, which explanation was satisfactory.

The committee on water works offered the following, which was adopted:

"Resolved, that the Mayor and Council of the City of Columbus, being satisfied that the water works for the supply of water for the city and citizens of Columbus, has been completed by the Columbus Water Works Company in accordance with the contract made between the said Mayor and Council and Thos. R. White on the 7th day of October, 1881, and subsequently on the 3rd day of April, 1882, transferred to the said Columbus Water Works Company, and the said Mayor and Council hereby accept the same, and the committee are hereby authorized to locate drinking fountains and adopt such other measures that may be necessary for the full execution of said contract."

Ald. W. H. BRANNON,
N. N. CURTIS,
Mr. JNO. HILL,
Mr. W. R. BROWN,
Com.

The foregoing two pages of typewritten matter are a true extract from the Minutes of the proceedings of the City Council of Columbus, held on Nov. 6, 1882.

81 EXHIBIT "D."

An Ordinance.

Submitting to the qualified voters of the City of Columbus the question of the issuance of two hundred and fifty thousand dollars of bonds of the City of Columbus at a special election to be held for that purpose on the 4th day of December, 1902, said bonds to bear interest at the rate of four per cent. per annum, payable semi-annually, and to mature in twenty-five years from the date of their issue, ten thousand dollars of the principal of said bonds to be paid annually, the proceeds to be derived from the sale thereof to be used only for the purpose of building, equipping, operating and owning a system of water works by the city of Columbus; and providing for the opening of a special registration, and for other purposes.

Whereas, The Columbus Water Works Company has totally failed to supply the city of Columbus and its inhabitants with a sufficient quantity of pure and wholesome water; and

Whereas, The public health of the city of Columbus is paramount in importance to every other consideration; and the owning by the city of Columbus of her own water works would result in a great saving in the cost of fire protection, sanitation and other purposes; and as the amount necessary to be expended in the construction and equipment of water works and appurtenances can only be raised by an increased rate of taxation, or by the issue and sale of a series of bonds of the city, and

Whereas, It is believed that the principal and interest of a
82 sufficient amount of bonds necessary to raise a sum sufficient to construct, establish and equip a proper system and plant of water works can be met through a series of years without an increase in the taxation, and

Whereas, The present bonded indebtedness of the city of Columbus, to-wit: the sum of five hundred and three thousand and five hundred dollars is much less than 7 per cent. of the assessed valuation of all the taxable property in said city, which, in round numbers, is eleven million, six hundred thousand dollars; and that under the constitution and laws of this state the city of Columbus, with the assent of two-thirds of the qualified voters thereof can legally issue a series of bonds to the amount of two hundred and fifty thousand dollars in addition to the present bonded indebtedness; therefore

It is ordained By the mayor and board of aldermen of the city of Columbus as follows:

SECTION 1. That in accordance with the constitution and laws of this state a special election shall be held by the qualified voters of the city of Columbus on the 4th day of December, 1902, to determine the question whether or not the city shall issue its bonds in the sum of two hundred and fifty thousand dollars, the same bearing interest at four per cent. per annum, as hereinafter more fully set forth.

SEC. 2. That for the purposes of said election and according to the provisions of the charter of the city of Columbus, the clerk of council is hereby ordered to open a special registration of the voters of said

city, three months prior to the 4th day of December, 1902, said registration to be held and conducted under the same rules and regulations that govern annual registrations for the election of mayor and
83 aldermen of said city.

SEC. 3. That notice of said special election shall be published in the Columbus Ledger, the same being the newspaper in which the sheriff's advertisements for the county of Muscogee are published, for thirty days next preceding the day of said special election, as is by law provided; and that at said election the qualified voters of the city of Columbus, to-wit: those who have registered in the special registration herein provided for, shall be entitled to vote for or against the issue of said bonds; that said election be held at the court house, in said city, between First and Second avenues and Ninth and Tenth streets, the same being the place where annual elections for mayor and aldermen are held; and that said election shall be held in the same manner and under the same rules and regulations as govern the annual elections for mayor and aldermen for said city; and in accordance with the charter of said city of Columbus; and that returns of said election be made and the votes cast therein be counted and consolidated in the same manner as govern said elections for mayor and aldermen of said city.

SEC. 4. That said election be held for the purpose of ascertaining whether the qualified voters of the city of Columbus will assent to the issue and sale of two hundred and fifty thousand dollars of bonds of the city of Columbus, numbered from 1 to 250, inclusive, of the denomination of one thousand ($1,000) dollars each and to be designated as "water works bonds" and to be used for the purpose of building, establishing, equipping and owning and operating a system of water works with the necessary sites, ways and structures therefor for the city of Columbus, all of which is to be located at such place or places as may be hereafter selected by the city authorities,
84 and the same to be the property of the city of Columbus. The principal of said bonds is to be paid in the following manner, to-wit:

Ten thousand ($10,000) dollars to be paid off at the end of one year from the date of the issuance thereof; and ten thousand ($10,000) dollars to be paid off each and every year thereafter, so that the last installment of said bonds shall become due and payable twenty-five years from the date of the issuance thereof. Said bonds to be paid off and retired each year shall be in the order in which they are numbered, that is to say: bonds numbered from one to ten inclusive, shall be paid off at the end of the first year, and from 11 to 20 inclusive at the end of the second year, and so on in that manner until all of said bonds shall have been fully paid off and discharged. Said bonds are to bear interest from the date of their issue at the rate of four (4) per cent. per annum, and to become due and payable semi-annually on the first days of April and October in each year; and said bonds to be due and payable at the city treasury in Columbus, Ga., both principal and interest, and are to be payable in gold coin of the United States of America, of the present standard of weight and fineness. That said bonds if authorized to be issued by

the qualified voters of Columbus shall be signed by the mayor and treasurer of the city of Columbus, and shall have the corporate seal of the city affixed thereto by the clerk of council; and the interest coupons on baid bonds shall be signed with a fac simile engraved signature of the said treasurer. Said bonds are to be sold to the highest and best bidder for cash, under such rules and regulations as may be hereafter prescribed by the mayor and board of aldermen, but the same are not to be sold for less than par; and the proceeds derived from the sale thereof are to be used for the sole purpose of
85 building, constructing, establishing, equipping and owning a system of water works, together with the necessary sites, ways and structures therefor to the extent that the same can or may be done by the expenditure of the proceeds of the sale of said issue of two hundred and fifty thousand ($250,000) dollars of bonds.

SEC. 5. That notice of this election shall be given, as required by law, for thirty (30) days next preceding the said day of election in the Columbus Ledger, a newspaper published in the city of Columbus, the same being the newspaper in which the sheriff's advertisements for the county of Muscogee are published.

SEC. 6. That at said election every duly qualified voter of said city who shall have registered for this election under the special registration hereinbefore provided for, to be held on the 4th day of December, 1902, shall be entitled to vote for or against the issuance of said water works bonds; and that at said election each voter shall have written or printed on his ballot "For Water Works Bonds," or "Against Water Works Bonds."

SEC. 7. That in the event the issue of bonds proposed herein is assented to by two-thirds of the qualified voters of said city at said election, and the same shall have been validated as by statute provided, an annual tax shall be thereafter levied and collected by the mayor and board of aldermen of the city of Columbus on the taxable property within said city sufficient to pay the interest semi-annually as aforesaid on said issue of bonds or so much thereof as may not be paid from the income to be derived from said water works,
86 and for the payment of the interest on such of said bonds as may not have been paid off for each and every year thereafter, and for the payment annually of ten thousand dollars of the principal of said bonds, or so much thereof as may not be paid from the income to be derived from said water works, so that the principal and interest of said bonds shall be paid off and extinguished at the respective dates of maturity as fixed in this ordinance.

SEC. 8. That in the event that the assent of the qualified voters of the city of Columbus is given at said election to issue said bonds as is herein provided, and when the same shall have been validated, as by law required, then before the issuance and sale of the same and the incurring of the indebtedness by the city of Columbus, an ordinance or ordinances, shall be passed by the mayor and board of aldermen of the city of Columbus, providing for the issue and sale of said bonds at such times and in such a manner as the same may be needed for the purpose of constructing, building and owning such system of water works; and also providing for the appropriation of the proceeds

of the sale of the same as in this ordinance set forth; and also for the making provision for the assessment and collection of taxes sufficient to pay the principal and semi-annual interest on said bonds sufficient to discharge them in accordance with the provisions of this ordinance. Also providing that the net income to be derived from the water works after paying the annual expenses of maintaining and operating same, shall be pledged and applied primarily to the payment of the interest on said bonds and in paying the bonds as they mature each year. Also for making provision for the assessment and collection each year of a tax sufficient to pay the interest on said bonds, and to pay said bonds as they mature, or so much
87 thereof as may not be paid from the income to be derived from the water works.

SEC. 9. In event the assent of the qualified voters of the city of Columbus is given at said election to issue said bonds as is herein provided, and when the same shall have been validated as by law required, thereafter the water works shall be considered a separate and distinct department of the city government, and it shall be the duty of the mayor and board of aldermen before the issuance of the bonds to provide by ordinance for the election by the mayor and board of aldermen of a commission to consist of four members who, together with the mayor as an *ex-officio* member shall be known as the Water Commission, and said commission shall have control of the building, operating and management of the water works. The said ordinance shall plainly state the powers, duties and obligations of the said commission.

SEC. 10. That said bonds and coupons herein provided for, when issued, shall be free and exempt from taxation by the city of Columbus; and shall be receivable by the city for all taxes or dues to the city.

SEC. 11. That J. M. Lennard, J. G. Moon, Joseph Phipps, A. W. Cozart be and they are hereby appointed managers of said bond election as herein provided for; and that Will Ligon, Jacob Feiler, R. J. Hunter, W. R. Bedell be and they are hereby appointed clerks at said election, if the managers or clerks named in this section or any of them, decline or fail to serve, the mayor shall appoint others, legally qualified to fill such vacancies, and the sum of forty dollars is hereby appropriated for the purpose of paying said managers and clerks and other expenses incident to said election, as by law
88 provided, to the first meeting of the mayor and board of aldermen of the city of Columbus, after said election shall have been held; and that said polls for the purpose of receiving votes at said election shall open at six o'clock a. m. and close at seven o'clock p. m.

SEC. 12. That all laws and parts of laws in conflict herewith be and the same are hereby repealed.

89 EXHIBIT "E."

COLUMBUS, GA., *May 6th*, 1903.

To the Honorable Mayor and Board of Aldermen of the City of Columbus.

GENTLEMEN: As secretary of the board of water commissioners of the city of Columbus, I beg to advise your honorable body that at a meeting of said commissioners, held on the 5th inst., a motion was unanimously adopted that you be requested to invite bids for the bonds of said city for the purpose of constructing a system of water works for said city; said bids to be opened on August 1st, next.

Very respectfully, JNO. C. COOK,
Secretary Board of Water Commissioners.

Alderman Newman offered the following resolution, which was adopted:

Whereas, it appears from a communication received from the board of water commissioners that active steps are being taken to build the system of water works to be owned and operated by the city, and that they will at some time in the near future desire the use of the money to be derived from the issue and sale of the bonds of the city recently authorized by the qualified voters of the city in the sum of two hundred and fifty thousand dollars.

It is therefore resolved by the mayor and board of aldermen of the city of Columbus as follows:

That the finance committee, in conjunction with the mayor, be and they are hereby authorized and directed to advertise for bids for said bonds in such manner and to such extent as to them may seem fit and proper to obtain the highest possible price therefor, said bids to be opened on the first day of August, 1903, with the right reserved to accept or reject any and all bids that may be made therefor.

90 EXHIBIT "F."

$250,000—4% *Municipal Water Works Bonds.*

COLUMBUS, GEORGIA, ——, 1903.

Sealed Bids for the Purchase of these Bonds are invited, and will be received by the City of Columbus up to noon of Saturday, August 8, 1903.

For the purpose of constructing, owning and operating a system of Water Works the City of Columbus, Georgia, will offer for sale $250,000 Twenty-five Year Serial, Four Per cent. April and October Gold Bonds of the denomination of One Thousand Dollars ($1,000), dated October 1, 1903; Ten Thousand Dollars maturing October 1, 1904, and Ten Thousand Dollars annually thereafter up to and including October 1, 1928; the principal and interest being payable in gold at the office of the City Treasurer in Columbus, Georgia.

The Interest Coupons will Mature on April 1st and October 1st each Year.

The Bonds will Mature as follows:

$10,000 due October 1, 1904,
$10,000 due October 1, 1905,
$10,000 due October 1, 1906,
$10,000 due October 1, 1907,
$10,000 due October 1, 1908,
$10,000 due October 1, 1909,
$10,000 due October 1, 1910,
$10,000 due October 1, 1911,
$10,000 due October 1, 1912,
$10,000 due October 1, 1913,
91 $10,000 due October 1, 1914,
$10,000 due October 1, 1915,
$10,000 due October 1, 1916,
$10,000 due October 1, 1917,
$10,000 due October 1, 1918,
$10,000 due October 1, 1919,
$10,000 due October 1, 1920,
$10,000 due October 1, 1921,
$10,000 due October 1, 1922,
$10,000 due October 1, 1923,
$10,000 due October 1, 1924,
$10,000 due October 1, 1925,
$10,000 due October 1, 1926,
$10,000 due October 1, 1927,
$10,000 due October 1, 1928.

The issue and sale of these Bonds have been authorized by the qualified voters of the City of Columbus at an election held on the 4th day of December, 1902, as provided by law, pursuant to Sections 377 to 381, inclusive, of Vol. 1 of the Civil Code of Georgia for 1895, and pursuant to the provisions of the Constitution as embodied in Paragraphs 1 and 2 of Section 7, Article VII. Said Bonds have been validated and confirmed by the Judge of the Superior Court of Muscogee County, in conformity with an Act of the General Assembly of Georgia, approved December 6th, 1897 (see Acts 1897, page 82), which judgment of validation has been passed upon and affirmed by the Supreme Court of Georgia.

The total number of qualified voters for the election was	1,734
Favorable votes required for authorization	1,156
Favorable votes cast	1,640
Unfavorable votes cast	7
92 Number of qualified voters who failed to vote	87
Population of Columbus by the U. S. Census of 1960.	17,614
Estimated present population	20,000
Assessed valuation of Taxable Property	$13,094,094.00
Bonded Debt authorized by Charter, 7 per cent	$916,586.00
Present Bonded Debt, including this issue	$746,500.00
Floating Debt	None.

Bonded Debt of the City of Columbus, Ga., Jan. 1, 1903.

Due 1903 (College Bonds)	$4,000	
1904 5 per cent	10,500	
1905 5 per cent	17,500	
1906 5 per cent	5,500	
1907 5 per cent	10,500	
1908 5 per cent	11,000	
1909 5 per cent	258,000	$317,000
1927 4½ per cent	55,000	
1928 4½ per cent	50,000	105,000
1931 3½ per cent	38,500	38,500
1904 to 1912, 4 per cent. Bridge Bonds $4,000 each year	36,000	36,000
Total		$496,500

No question as to the validity of any Columbus Bonds has ever been raised, nor has this City ever defaulted in the payment of principal or interest of its bonded debt.

In addition to the general credit of the City, the net revenue from the operation of the Water Works is pledged, by an act of the General Assembly of Georgia, for the payment of the principal and interest on these Bonds.

Purchasers of these bonds must take same in lots of $25,000, or multiples thereof, in order that each purchaser will receive a proportionate share of the Bonds maturing each year.

93

The bonds will be delivered to purchasers at Columbus, Ga., and final payment required on January 1st, 1904.

Each bid must be accompanied by a certified check for two and one-half per cent. of the face value of the Bonds bid for, the amount of said check to be credited on the purchase in case of acceptance, or returned in case of rejection of the bid.

The City of Columbus reserves the privilege of rejecting any or all bids.

Respectfully, L. H. CHAPPELL, *Mayor.*

E. P. DISMUKES,
E. J. WYNNE,
W. J. HARTMAN,
Finance Committee.

94 *Demurrer to Bill.*

In the Fifth Circuit Court of the United States for the Northern District of Georgia, Western Division.

Bill. In Equity. No. 59.

MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE
vs.
CITY OF COLUMBUS and Others.

The joint and several demurrer of the City of Columbus and of the several other above-named defendants to the bill of complaint of Mercantile Trust and Deposit Company of Baltimore, the above-named plaintiff.

These defendants by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are set out and alleged, do demur thereto upon the following grounds, to-wit:

First. Because the plaintiff has no such interest in the subject-matter as will entitle it to maintain this suit, for that there is no privity of contract between the plaintiff and these defendants, or either of them, nor are any facts alleged upon which an independent suit at the instance of the plaintiff can be predicated.

Second. Because even if the plaintiff has an interest in the subject-matter of the suit it has no proper title to institute a suit concerning it, for that it is not alleged that the plaintiff as trustee has been requested by a majority in interest of the holders of the bonds to institute and maintain this suit, nor does it appear under the
95 mortgage or deed of trust set out as an exhibit to said bill that the trustee either has a right or is under any duty to institute and prosecute this suit of its own volition and in the absence of proper request.

Third. Because the plaintiff has no such interest in the subject-matter of the suit as entitles it to call upon these defendants, or either of them, to answer its demand.

Fourth. Because the plaintiff is not entitled to the relief which is prayed for in said bill.

Fifth. Because there is a want of proper parties, for that the Columbus Water Works Company and W. S. Greene as receiver thereof are indispensable parties complainant.

Sixth. Because there is a mis-joinder of parties defendant in this, to-wit:

(1.) The Columbus Water Works Company is not a proper party-defendant, for that its interest in the controversy is wholly that of a complainant, and there is no allegation that the Columbus Water Works Company has been requested to join in this suit and has refused so to do.

(2.) The mayor and aldermen are not proper parties-defendant to this suit, for that they have no interest in the subject-matter thereof, inasmuch as the controversy set up in the bill relates entirely

to transactions with and the actings and doings of the city of Columbus, which, as shown in said bill, is a municipal corporation of the State of Georgia authorized by law to sue and to be sued in the name of the City of Columbus.

Seventh: Because there is no equity in said bill, for that:

96 (1.) There is no obligation resting upon the City of Columbus, either contractual or otherwise, binding it not to erect its own system of water works.

(2.) It is not alleged that the City of Columbus has revoked the franchise granted the Columbus Water Works Company or attempted so to do.

(3.) The City of Columbus as a municipal corporation of the State of Georgia could not legally grant any exclusive franchise for the use of its streets to the Columbus Water Works Company, and any attempt so to do on the part of the mayor and council is utterly void and in contravention to the Constitution and laws of this State.

(4.) If the City of Columbus has violated or should violate its contract with the Columbus Water Works Company by refusing to take or pay for the water, there is an adequate remedy at law, the injury being remedial in damages.

(5.) The Columbus Water Works Company being insolvent and all of its property rights and assets having been placed in the hands of a receiver for administration under the orders of this honorable court, the Columbus Water Works Company is utterly unable and has been deprived of the power to comply with its obligations under the contract with the City of Columbus.

Eighth. Because there is no federal question presented by the bill, it not being alleged that the City of Columbus has in its legislative capacity revoked the franchise of the Columbus Water Works Company or in any manner sought to impair the obligations of the contract.

Ninth. Because there is an adequate and complete remedy at law for the wrong and injury complained of, for that, if the city has

97 improperly refused to make payment of one quarter's water rentals, or has otherwise failed to comply with its contract, such wrong and injury is capable of pecuniary estimation and is remedial in damages.

And for special cause of demurrer, these defendants jointly and severally show:

1st. That the allegations contained in the 10th, 11th, 12th and 15th paragraphs of the bill alleging assent and acquiescence on the part of the citizens and inhabitants of the City of Columbus in and to the contract referred to is irrelevant, immaterial and argumentative.

Wherefore, and for divers other imperfections and errors contained in said bill, these defendants humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill or any of the matters or things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

T. T. MILLER,
J. H. MARTIN,
W. A. WIMBISH,
Of Counsel.

We certify that in our opinion the foregoing demurrer is well founded in point of law.

T. T. MILLER,
J. H. MARTIN,
W. A. WIMBISH,
Of Counsel.

98 STATE OF GEORGIA, *Muscogee County:*

In person before the undersigned appeared L. H. Chappell, who being duly sworn deposes and says that he is the Mayor of the City of Columbus, one of the defendants named in the original bill referred to in the foregoing demurrer, and also appeared E. P. Dismukes, J. I. Darby, W. C. Lawrence, J. D. McPhail, N. L. Dudley, L. T. Jones, R. Weiland, J. T. Montcrief, J. L. Newman, W. J. Hartman, L. A. Camp, F. M. Sommerkamp, E. J. Wynn, J. H. McKnight, Max Banner and T. E. Mitchell, and upon oath severally depose and say that they are aldermen of the said City of Columbus and defendants named in said bill, and said deponents severally say that said demurrer is not interposed for delay.

L. H. CHAPPELL.
W. C. LAWRENCE.
F. M. SOMMERKAMP.
J. D. McPHAIL.
L. A. CAMP.
E. P. DISMUKES.
R. WEILAND.
L. T. JONES.
T. E. MITCHELL.
W. J. HARTMANN.
J. H. McKNIGHT.
J. T. MONTCRIEFF.
E. J. WYNN.
J. I. DARBY.
N. L. DUDLEY.
MAX BANNER.
J. L. NEWMAN.

Sworn to and subscribed before me this Sept. 3rd, 1903.

A. W. COZART, [SEAL.]
Notary Public, Muscogee Co., Ga.

Filed in clerk's office 11 Sept. 1903,

O. C. FULLER, *Clerk,*
By N. A. BROWN, *Deputy.*

99 *Amendment to Bill.*

In the Fifth Circuit Court of the United States for the Northern District of Georgia, Western Division.

Bill, etc. In Equity. No. 59.

THE MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE, Trustee,

vs.

THE CITY OF COLUMBUS ET AL.

To the honorable the judges of the fifth circuit court of the United States for the northern district of Georgia, western division:

Comes now the complainant, the Mercantile Trust and Deposit Company, of Baltimore, trustee and shows unto the court:

That it is the purpose and desire of complainant and the bondholders of the Columbus Water Works Company represented by complainant as trustee to see that all proper and necessary steps are taken to furnish to the City of Columbus, and its citizens an ample supply of pure and wholesome water and pressure in accordance with the contract and with the aid of this honorable court to perform and cause to be performed all of the obligations assumed by the Columbus Water Works Company under the contract mentioned and exhibited in the above stated bill of complaint.

Complainant shows the court that the bondholders acting through their duly authorized bondholders committee have consented and authorized this complaint to offer on their behalf to the court to have the present and future income of the said water works applied so far as may be necessary to the betterment of said system, and to have such further receiver's certificates made and sold as in the opinion of the court will be adequate to furnish to the city and its citizens an ample supply of pure and wholesome water and adequate pres-
100 sure for fire protection in accordance with the terms and requirements of the contract, and to postpone the lien of the bonds to such receiver's certificates as the court may deem adequate and sufficient for the purpose, and complainant prays that a suitable reference be had to ascertain the probable cost of such improvements as to the court may seem adequate and proper, and complainant prays that the court through proper orders will direct and require a specific performance both by the city of Columbus and the Columbus Water Works Company of the mutual agreements, covenants and obligations of the said contract.

Complainant avers that under the orders of this honorable court there is now being furnished to the city of Columbus and its citizens an ample supply of pure and wholesome water and adequate and sufficient pressure in excess of the requirements of the contract, but complainant submits that if upon a reference being had, the court should determine that further improvements are requisite and necessary, that complainant is ready and willing, and the bondholders

of the said Columbus Water Works Company consent and agree, that such additional improvements be made and paid for.

Complainant shows that the city of Columbus and the other defendants in response and answer to the said bill of complaint averred that the city of Columbus and its citizens would be now content, in the event of a performance of the obligations of the contract on the part of the Water Works Company. Complainant believes that any failure on the part of the Columbus Water Works Company to perform has been brought about in large part, if not entirely, by the course of conduct pursued by the city of Columbus. But complainant says that this complainant, as trustee for the bondholders,

101 and the said bondholders of the Columbus Water Works Company, as the real beneficial owners of said property, are ready and willing, and it is their earnest desire to furnish to the said city of Columbus and its citizens an adequate and satisfactory system of water works, in full compliance with the specifications, requirements, letter and spirit of the said contract, and they pray that the court, as a court of equity, will give such direction to the cause as to forward and give effect to said purpose and enable complainant to carry out the same, and thereby save to the bondholders the large and valuable property which constitutes the security of their bonds from total destruction.

And complainant will ever pray, etc.

THE MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE, *Trustee,*
By J. PACKARD,
HALL & WIMBERLY,
L. F. GARRARD, *Complainant's Solicitors.*

The foregoing allowed and ordered filed, defendants reserving all objections.

In open court, this the 15th day of October, 1903.

WM. T. NEWMAN,
United States Judge.

Filed in clerk's office Oct. 15, 1903.

O. C. FULLER, *Clerk.*

102 *Demurrer to Amendment to Bill.*

In the Fifth Circuit Court of the United States for the Northern District of Georgia, Western Division.

In Equity. No. 59.

MERCANTILE TRUST AND DEPOSIT CO. OF BALTIMORE
vs.
THE CITY OF COLUMBUS ET AL.

Demurrer of the City of Columbus to the Original Bill as Amended.

Now comes the City of Columbus, one of the defendants named in the above entitled cause, by protestation, etc., not confessing or

acknowledging any of the facts in said amended bill contained to be true in such manner and form as the same are therein set out, doth demur thereto and for cause of demurrer shows:

First. That the bill as amended is without equity.

Second. That the said amendment is not germane to the cause of action set out in the original bill, but is in effect an application to the court to be allowed to pledge incomes and issue receiver's certificates for the purpose of enabling the receiver to relieve the existing default and carry out the obligations of the contract.

Third. That it appears from the amendment, the pleading being taken most strongly against the pleader, that the Columbus Water Works Company had failed to comply with the obligations of its contract to furnish the city and its inhabitants with a wholesome, constant and adequate supply of water for domestic use and fire protection.

103 Fourth. That it appears in the record in the case of Mercantile Trust and Deposit Company of Baltimore *vs.* Columbus Water Works Company, now pending in this court (to which cause the original bill herein contains express reference), that said Water Works Company had failed to comply with the obligations of its contract with the City of Columbus.

Fifth. That it appears from the contract, a copy of which is attached as an exhibit to the original bill herein, that no exclusive franchise or privilege was granted to the said Water Works Company to supply the city and its inhabitants with water, excepting from the source selected and by the system adopted.

Sixth. That no exclusive franchise for the use of the streets and for supplying the city and its inhabitants with water for a term of years could be granted under the Constitution and laws of this State; and any attempt to do so is null and void.

Seventh. That it appears from the ordinance of the city of Columbus providing for an election to determine whether the city should issue bonds for the purpose of constructing its own system of water works, a copy of which ordinance is attached to the original bill, that in abrogating the contract with the said Water Works Company and in providing for the construction of its own system, the city acted in the exercise of its police power and in due execution of the municipal trust committed to it.

Wherefore, this defendant prays the judgment of the court,
104 and that it may be hence dismissed with its reasonable costs in its behalf incurred.

T. T. MILLER,
J. H. MARTIN,
ELLIS, WIMBISH & ELLIS,
Solicitors.

T. T. MILLER,
J. H. MARTIN,
W. A. WIMBISH,
Of Counsel.

Certificate of Counsel.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law. This October 16, 1903.

T. T. MILLER,
J. H. MARTIN,
W. A. WIMBISH,
Of Counsel.

GEORGIA, *Fulton County:*

In person appeared before the undersigned, T. T. Miller, who, being duly sworn, deposes and says that he is City Attorney for the defendant, the City of Columbus, and as such a duly constituted officer of said city, and that the foregoing demurrer is not interposed for delay.

T. T. MILLER,

Sworn to and subscribed before me this October 16, 1903.

H. H. SIMMONS,
Deputy Clerk.

Filed in clerk's office Oct. 16, 1903.

O. C. FULLER, *Clerk,*
By H. H. SIMMONS,
Deputy Clerk.

105 *Opinion of Court.*

In the Circuit Court of the United States for the Northern District of Georgia, Western Division.

In Equity. No. 59.

THE MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE
vs.
THE CITY OF COLUMBUS ET AL.

The present hearing of this case is on an application for injunction *pendente lite.* The matter has been fully and ably argued by counsel for the respective parties, and submitted.

The case should first be considered upon the legal questions involved. The most important of these questions is as to whether the contract between the city and the water works company created an indebtedness in violation of the Constitution of the State of Georgia; and in determining this, whether this court will follow the decisions of the Supreme Court of the State, or those of the Supreme Court of the United States. A recent case decided in this court, Trust Co. *vs.* City of Dawson *et al.*, is controlling, and should be followed so far as applicable. Certainly a contrary ruling will not be made until the final determination of that case by the Supreme Court of the United States where it is now pending on appeal.

In the Dawson case the report of the master stated this question in

this way: "It is insisted that the decision of the Supreme Court of Georgia, declaring the invalidity of the contract, will be regarded as conclusive in this forum in deference to the rule that the Federal courts will follow the construction given Constitutions and statutes by the highest court of the State. The general rule is as
106 stated, but it is subject to important limitation and exceptions. The Federal court, in construing the meaning of a State statute as to what contract is contained therein and whether the State has passed any law impairing its obligation, is not bound by previous decisions in State courts, except when they have been so long and so firmly established as to constitute a rule of property; but will decide independently whether there is a contract and whether its obligation has been impaired."

After citing a number of authorities and discussing them at some length, the special master taking up the question of the State of the law in the courts of the United States, says: "That such a contract does not create a "debt" is not an open question in this forum. Upon this point the case of Walla Walla *v.* Walla Walla Water Company, 172 U. S. 1, 43 L. Ed. 341; is conclusive. In that case the city obligated itself to pay the water company $1,500 annually in quarterly installments, for twenty-five years, for the use of water for fire purposes. The charter of the city limited the amount of indebtedness it could incur. The sum of the installments agreed to be paid for the period named, would, if treated as a debt, cause the indebtedness of the city to exceed the charter limitations.

"The court, after declaring that the weight of authority, as well as of reason, favors the construction that a municipal corporation may contract for a supply of water or gas or like necessity, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the city's authorized indebtedness, says: 'There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may
107 arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as, by the issue of railway bonds or for the erection of a public improvement—though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed.

'In the case under consideration the annual rental did not become an indebtedness within the meaning of the charter until the water appropriate to that year had been furnisehd. If the company had failed to furinsh it, the rental would not have been payable at all, and while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation.'

After some further discussion of the matter the special master says: "I conclude on this branch of the case that the contract in question did not create a debt within the meaning of the Georgia Constitution."

The master discusses the effect and sate of the decisions of the Supreme Court of the State at the time the Dawson contract was entered into, and cites among other cases that of Mayor of Rome *v.* McWilliams, 67 Ga., 106, decided at the September Term 1881; and also the case of Butts *v.* Little, 68 Ga., 272, also decided in 1881. He also cites some cases subsequent to the two cases named decided prior to the making of the Dawson contract in 1890, which were pertinent probably to the Dawson case, but which are not pertinent here. The report of the special master then proceeds: "The principle in these cases" (from 1881 to 1890) "was consistent with that declared in Rome *v.* McWilliams, 67 Ga., 106, and Butts *v.*
108 Little, 68 Ga., 272, that the obligation to pay for work when and as it shall be performed in future, by an annual levy of taxes sufficient to meet the accruing installments, does not create an indebtedness within the meaning of the Georgia Constitution. These cases certainly warrant the conclusion that at the time the contract was entered into with the water company, contracts of that character had not been declared invalid by the Supreme Court of Georgia. Indeed that court has deemed it necessary to overrule Butts *v.* Little (Lewis *v.* Lofley, 92 Ga. 804, Dawson *v.* Water Works Co., 106 Ga. 727) and to overrule, qualify or distinguish several of the other cases referred to in this report.

"It cannot therefore fairly be said that there was such a settled course of judicial decisions in Georgia on this question, at the time of the making of the contract, as to constrain the courts of the United States to follow later decisions of the State courts, especially in a case where the rights of innocent third persons are concerned."

"Subsequent to the making of this contract, and after the rights of the complainant and the bondholders had been acquired, the Supreme Court of Georgia unequivocally held that contracts of this character constituted the creation of an indebtedness within the inhibition of the State Constitution. Cartersville Imp. Co. *v.* Cartersville, 89 Ga. 683; Cartersville Water Co. *v.* Cartersville, 89 Ga. 689; City of Dawson *v.* Dawson Water Works Co., 106 Ga. 696."

"I therefore conclude that this court is not bound to follow the later decisions of the State court as to the validity of the contract in question, but should exercise its independent judgment with reference thereto."

From these citations it will be seen that the decisions
109 of the Supreme Court of the State were quite as favorable to the validity of the contract in this case as they were at the time of the contract in the Dawson case. If in that respect, there is any distinction in the two cases, it is favorable to the complainants here.

Another question involved here on the law of the case, is as to the power of the city to make this contract, and also as to its effect against the city when made. On this question, in the report of the master in the Dawson case, the following is said:

"It is contended on the part of the city that no exclusive franchise to occupy the streets and maintain a water system could be lawfully granted; and from this it is argued that the franchise may be revoked and the city may use its streets for its own system.

"The grant of a right to supply water to a city, and its inhabitants, through pipes and mains laid in the streets upon the condition of the performance of its service by the grantee, is a grant of a franchise in consideration of the performance of a public service and after performance by the grantee is a contract protected by the Constitution of the United States. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, and cases there cited. The right of a city to do those things necessary to supply its inhabitants with water for domestic use, or to provide the city with protection against fire, is the settled law of Georgia. Dawson *v.* Dawson Water Works, 106 Ga. 709; Frederick *v.* Augusta, 5 Ga. 561; Rome *v.* Cabbott, 28 Ga. 50; Wells *v.* Atlanta, 43 Ga. 67; And an incident to the principal undertaking the city possesses the power to grant the use of its street, and to contract with a private company for an exclusive supply of water for fire protection.

110 "It is unnecessary to decide whether the city may grant an exclusive franchise far a long number of years in excess of the contractual period between the city and the Water Company. Should a third person in good faith seek a franchise for the use of the streets for a similar purpose, the point would be properly involved. The question now presented is whether the City can directly revoke the grant, or itself use the streets in competition with the water company, in the face of its contract with the water company. The contract does not in terms express an agreement that the city will not, during the life of the contract, erect its own system for the purpose of supplying its inhabitants with water; but it can hardly be doubted that such is the fair implication and reasonable intendment of the contract. The city having induced the expenditure of money on faith of the promise that it would grant the exclusive use of the streets for the laying of pipes and mains by the water company, and having contracted to pay for pipes and mains by the water company, and having contracted to pay for the use of water for fire protection for a term of years, will not be permitted in equity to disregard its agreements by itself entering into ruinous competition with the other party before the expiration of the contractual term. Southwest Missouri Light Co. *v.* City of Joplin, 101 Fed. 23; Walla Walla *v.* Walla Walla, 172 U. S. 1, 43 Law Ed. 341.

"I conclude that the city may not, prior to the expiration of the term for which it contracted for a supply of water for fire protection, directly revoke the grant of the franchise for the use of its streets by the water company, or indirectly impair or destroy the

111 value of the franchise by itself entering into competition with its grantee. To this extent the right is protected by the obligation of the contract entered into. St. Tammay Water Co. *v.* New Orleans Water Co. 120 U. S. 64, 30 L. Ed. 563; Louisville Gas Co. *v.* Citizens Gas Co., 115 U. S. 683, 29 L. Ed. 510; Bartholomew *v.* City of Austin, 85 Fed. 359."

The applicability of the language used by the master to the facts of this case is so apparent that it need not be discussed.

As the report of the master in the Dawson case was in all things

approved and confirmed in the Circuit Court, it follows of course that the conclusions of law reached were satisfactory and met the full approval of the court, and are in effect adopted as the law of that case. For that reason the quotations from the able report of the master have been given above.

On the facts of this case much evidence has been submitted by affidavits and by documents. This evidence has gone mainly to the issue made in the case as to whether there has been a compliance on the part of the water works company with the terms of its contract, and this relates to the original construction of the water works and as to the character and quantity of water furnished the city and its inhabitants since its construction.

It cannot be doubted that there was a very serious condition in Columbus as to water supply during part of the year 1902, and this condition probably more than anything else led to the action of the city which gave rise to the present controversy. There has been an earnest attempt on the part of the bondholders acting through the trust company, complainant in this case, to remedy this
112 condition; and it is not denied that its efforts have resulted in very great improvement in the quality of the water furnished.

In an amendment to the bill, on October 15th, 1903, complainant submitted: "That it is the purpose and desire of complainant and the bondholders of the Columbus Water Company represented by complainant as trustee, to see that all proper and necessary steps are taken to furnish to the city of Columbus and its citizens an ample supply of pure and wholesome water and pressure in accordance with the contract and with the aid of this honorable court to perform and cause to be performed all of the obligations assumed by the Columbus Water Works under the contract mentioned and exhibited in the above stated bill of complaint.

"Complainant shows the court that the bondholders acting through their duly authorized bondholders' committee have consented and authorized this complainant to offer on their behalf to the court to have the present and future income of the said water works applied so far as may be necessary to the betterment of said system, and to have such further receiver's certificates made and sold as in the opinion of the court will be adequate to furnish to the city and its citizens an ample supply of pure and wholesome water and adequate pressure for fire protection in accordance with the terms and requirements of the contract, and to postpone the lien of the bonds to such receiver's certificates as the court may deem adequate and sufficient for the purpose; and complainant prays that a suitable reference be had to ascertain the probable cost of such improvements as to the court may seem adequate and proper, and complainant prays that the court through proper orders will direct and require a specific performance both by the city of Columbus and the
113 Columbus Water Works Company of the mutual agreements, covenants and bligations of the same contract. * * * if upon reference being had, the court should determine that further improvements are requisite and necessary, complainant is ready

and willing, and the bondholders of the said Columbus Water Works Company consent and agree that such additional improvements be made and paid for."

This is a very broad offer on behalf of the bondholders on whose behalf the trustee brings this bill. Their ability to comply with this offer has not been questioned. They have already expended in the filtration system, and otherwise improving the water works, an amount said to be fifty thousand dollars. The amount of the bonded indebtedness is nearly four hundred thousand dollars. That this amount of indebtedness should be wiped out without careful investigation, will hardly be claimed by any one. It is certainly due the bondholders in view of their efforts to take up this contract with the water works company and comply with it, that they should have a full and fair investigation before the property upon which they must rely as security for their debt, is destroyed. That the erection of another system of water works in the city of Columbus will go very far towards destroying the property, is manifest.

It is also due the city of Columbus that it should be allowed to show in the fullest manner its contention. The great importance of the matter to the city and its inhabitants requires this.

The contract between Thomas R. White and the city of Columbus, which subsequently became by agreement of the mayor and council of the city of Columbus a contract between the Columbus Water Works Company and the city, provided that the "source of
114 water supply shall be determined by Thomas R. White, he guaranteeing, however, that the supply of water both in quality and amount shall be wholesome, constant and amply sufficient to meet the wants of the city and private consumers for future and present requirements." The city and its inhabitants are entitled under this contract to an abundant supply of wholesome water, and this sufficient to meet the wants of the city as it increases in population and area. It is contended that this cannot be obtained from the present source of supply. The complainant proposes, as I understand it, to change this source of supply to one which is abundant and undoubted, and to do that immediately.

All the questions involved are serious and of the gravest importance, and they should not be disposed of on a preliminary hearing and on *ex parte* affidavits. It is due both parties that testimony should be carefully taken by examination and cross examination of witnesses.

The case will be referred to a master for the purpose of a full investigation and report upon the questions of law and fact involved.

In the meantime, an injunction will be granted restraining the city of Columbus from taking steps towards the sale of its bonds for the erection of a system of water works of its own.

This the 19th day of November, 1903.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's office 20 Nov. 1903.

O. C. FULLER, *Clerk,*
By N. A. BROWN, *Deputy.*

115 *Order Overruling Demurrer.*

In the Fifth Circuit Court of the United States for the Northern District of Georgia, Western Division.

Bill in Equity. No. 59.

THE MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE, Trustee,
v.
THE CITY OF COLUMBUS ET AL.

The defendant, City of Columbus, having filed its demurrer to the bill of complaint in the above stated cause and also its demurrer to the amendment to said bill, and said demurrers having come on to be heard, and after hearing argument of counsel thereon, it is ordered by the court that said demurrers be and the same are hereby overruled, on each and every ground set forth therein.

This the 8th day of Dec'r 1903.

WM. T. NEWMAN,
United States Judge.

Filed in clerk's office 8 Dec. 1903.

O. C. FULLER, *Clerk,*
By N. A. BROWN, *Deputy.*

116 *Bill for Foreclosure of Mortgage.*

In the Circuit Court of the United States for the Northern District of Georgia.

In Equity. No. 57.

THE MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, Trustee,
v.
THE COLUMBUS WATER WORKS COMPANY.

To the Honorable the Judge of said Court:

The bill of complaint of the Mercantile Trust and Deposit Company of Baltimore, a body corporate of the State of Maryland, trustee as hereinafter mentioned, respectfully shows:

1. That by virtue of a mortgage or deed of trust from the Columbus Water Works Company of Columbus, Georgia, bearing date the 1st day of January, 1891, and recorded in Lee county Alabama in record of deeds Vol. A. 13, page 149, and also recorded in the clerk's office of the superior court of Muscogee county, Georgia, in record of Mortgages Vol. G. folio- 500 to 522, it is the holder of the property thereby conveyed, in trust for the holders of the bonds issued under said mortgage and secured thereby. The said mortgage is referred

to as part hereof and a duly certified copy of the same will be filed as an Exhibit hereto if requisite.

2. That by paragraph G of the twentieth clause of said mortgage, the Columbus Water Works Company aforesaid covenanted and agreed with your orator as follows:

"G. That during the continuance of this deed of trust the said party of the first part will not do or suffer to be done any act or acts whereby the security of the said bondholders shall be in any way or manner or in any amount impaired, and that the said party
117 of the first part will at all times, maintain, preserve and keep its water works, pumps, machinery, reservoirs, piping, hydrants and equipments in good repair, working order and condition and supplied with all the machinery, equipments and appliances for providing water to the city of Columbus and vicinity and shall and will from time to time make all needful and proper repairs, renewals and replacements and useful and proper alterations, additions, betterments and improvements."

3. That your orator is informed that for more than six months last past the Columbus Water Works Company has suffered the security of the bondholders to become impaired by not maintaining and keeping its water works supplied with all the machinery, equipments and appliances for providing water to the city of Columbus and vicinity, and by not making useful and proper additions, betterments and improvements to said waterworks. Further explaining the foregoing allegation your orator states that, owing to an unprecedented and protracted drought the sources of supply of water for the said water works have to a large extent failed for the time being; that it is within the power of the said water works company to provide for such a contingency by seeking and availing itself of other sources of supply, but that, as your orator is informed, owing to the attitude of the city of Columbus, which now is taking steps to provide a water supply of its own, the Columbus Water Works Company is unable to sell its bonds reserved in its treasury for such purposes and which could have been sold except for the said attitude of said city and therefore is unable to carry out the betterments and improvements in its water supply above mentioned.

4. That under the fourth clause of said mortgage it is
118 made the duty of your orator, among other things, upon any default of the mortgagor in any covenant or condition of said mortgage which may continue for six months, and upon the written request of the holders of a majority in value of the bonds secured thereby and then outstanding, to institute proceedings for the foreclosure of said mortgage and in connection therewith, for the appointment of a receiver of all the assets and property of the mortgagor. The said clause further provides that in case of such foreclosure the whole principal sum of the indebtedness evidenced by the said bonds and coupons shall be due and demandable.

5. That there are now, outstanding under said mortgage, bonds to the amount of four hundred thousand dollars upon which interest has been paid up to the 1st day of July, 1902. But your orator is

informed and believes that said Columbus Water Works Company will not be able to meet its interest falling due January 1st, 1903, by reason of the large expenditures necessarily incurred by it, on account of a disastrous freshet which occurred in February last and which utterly destroyed the bridge across the Chattahoochee river, on which were laid the water mains of said company, thereby severing the connection between its source of supply in Alabama and its consumers in Georgia and causing the expenditure of a large amount of money for the purchase and laying of pipes northward on the Alabama side, thence across the railroad bridge of the Central of Georgia Railway Company and southward on the Georgia side to re-establish its connections with the consumers in the city of Columbus, wherein it has expended a large amount of money, consuming all of its cash on hand. Said company has no floating debt, except the sum of $5500, all of which is represented by additions to the corporate assets of said company; $2500 of this indebtedness is secured by eight bonds of the Columbus Water Works Com-
119 pany of a thousand dollars each and the remaining $3000 is secured by transfer of debts due to said company, which said debts of $5500 of said company are just and valid obligations and should be paid by the receiver when appointed; and said collaterals redeemed.

6. That your orator has received a written request from persons holding or representing a majority of the bonds outstanding under said mortgage to institute proceedings for its foreclosure and for the appointment of a receiver of all the assets and property of the Columbus Water Works Company aforesaid.

To the end therefore:

1. That the Columbus Water Works Company aforesaid may be decreed to pay to your orator, as trustee, the whole indebtedness both principal and interest which may be due under said mortgage, together with the costs of this suit, by a short day to be appointed for that purpose; or in default thereof, that the said Columbus Water Works Company, and all persons claiming under it, may be absolutely debarred and foreclosed of and from all right and equity of redemption in or to said mortgaged premises and every part thereof.

2. That this honorable court will be pleased to appoint a receiver of all the rents and profits, debts, dues and demands and choses in action, and of the property estate and assets of the Columbus Water Works Company conveyed or intended to be conveyed by said mortgage, or which it may possess or be entitled to or interested in, and that said receiver, when appointed, may pay the aforesaid indebtedness of said company of $5500 and redeem said collaterals as soon as possible.

120 3. That your orator may have such other and further relief as its case may require.

May it please this honorable court to grant unto your orator a writ directed to the Columbus Water Works Company aforesaid, commanding it to be and appear in this court at some certain day,

to be named therein, and answer the premises and abide by and perform such decree as may be passed therein.

And as in duty bound etc.

MERCANTILE TRUST & DEPOSIT CO.
OF BALTIMORE,
By JOHN GILL, *Pres't.*

[Seal Mercantile Trust & Deposit Co.]

Attest: J. R. WALKER, *Secretary.*

L. F. AND FRANK GARRARD,
JOSEPH PACKARD,
Solicitors for Plaintiff.

STATE OF MARYLAND, *Baltimore City, To-wit:*

I hereby certify that on this twentieth day of December, 1902, before the undersigned, a notary public in and for the State and city aforesaid personally appeared John Gill, president of the Mercantile Trust and Deposit Company of Baltimore and made oath in due form of law that the matters and things stated in the foregoing bill are true to the best of his knowledge and belief.

Witness my hand and notarial seal the day and year aforesaid.

THOS. H. FITCHETT,
[SEAL N. P.] *Notary Public.*

Filed in clerk's office 23 Dec. 1902.

O. C. FULLER, *Clerk,*
By N. A. BROWN, *Deputy.*

121 *Motion to Dismiss for Want of Jurisdiction.*

In the Circuit Court of the United States for the Northern District of Georgia, Western Division.

Bill. No. 59.

MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE
v.
CITY OF COLUMBUS ET AL.

Now comes the City of Columbus by its counsel and respectfully moves the court to dismiss the original and amended bills in the above entitled cause for want of jurisdiction on the following grounds, to-wit:

First. Because there is no such diversity of citizenship as is requisite to sustain the jurisdiction of this court, for that the Columbus Water Works Company while nominally a defendant should be aligned with the plaintiff according to interest, and the said water works company is a corporation and citizen of the same State as this defendant.

Second. Because there is no federal question involved on which
e jurisdiction of this court can be sustained independently of
versity of citizenship, for that the action of the city in proceeding
issue bonds for construction of its own system of waterworks con-
ituted at most a mere breach of the contract not equivalent to legis-
tion affecting or impairing the obligation of the contract between
e city and the Columbus Water Works Company as assignee of
homas R. White, in contravention of the Constitution and laws of
e United States.

Wherefore, this defendant, the City of Columbus, prays
22 the court to dismiss said original and amended bills and all
proceedings in the cause subsequent thereto for want of juris-
ction, and that this defendant may be hence discharged with its
asonable costs.

T. T. MILLER,
J. H. MARTIN,
ELLIS, WIMBISH & ELLIS,
Solicitors and of Counsel for City of Columbus.

TATE OF GEORGIA, *County of Muscogee:*

In person appeared before the undersigned L. H. Chappell, who,
eing duly sworn, deposes and says that he is mayor of the City of
olumbus, the movant named in the foregoing motion, and that said
otion is not interposed for delay.

L. H. CHAPPELL.

Sworn to and subscribed before me this March 17, 1905.

A. W. COZART,
[SEAL N. P.] *Notary Public, Muscogee County, Ga.*

We hereby certify that in our opinion the foregoing motion is
ell founded in point of law.

T. T. MILLER,
J. H. MARTIN,
W. A. WIMBISH,
Of Counsel for City of Columbus.

Filed in clerk's office 17 March, 1905.

O. C. FULLER, *Clerk*,
By N. A. BROWN, *Deputy.*

123 *Response to Motion to Dismiss.*

In the Circuit Court of the United States for the Northern District of Georgia, Western Division.

Bill. Equity No 59.

MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE
v.
CITY OF COLUMBUS ET AL.

Response of the Mercantile Trust & Deposit Company of Baltimore, to the motion of the City of Columbus to dismiss for alleged want of jurisdiction.

Now comes the Mercantile Trust & Deposit Company of Baltimore, Maryland, the complainant in the original and amended bills in the above entitled cause, and by way of response and opposition to the motion of the said defendant, the City of Columbus, to dismiss the original and amended bills in the said cause on the ground of alleged want of jurisdiction, answers and says:

I. In answer to the first ground of the motion to dismiss the bill and amended bill, plaintiff in this case says that, as appears from the original bill in this cause, paragraph 20, the plaintiff filed its bill in this court on December 22, 1902, against said Columbus Water Works Company for the foreclosure of the mortgage of said company to this plaintiff as trustee, a copy whereof is attached to said original bill, marked Exhibit "A;" and afterwards when this plaintiff filed said original bill against said City of Columbus, the said Columbus Water Works Company was made a co-defendant thereto And the plaintiff says that the interest which it represents as trustee in this litigation is in no sense the same as that of the said

124 Water Works Company, but, on the contrary, is separate and distinct therefrom and adverse thereto, and the relief which it seeks is such as it is itself entitled to ask, and will redound directly and exclusively to the benefit of the parties it represents as trustee, and not to the benefit of the said Water Works Company. The receiver of said Water Works Company, appointed by this honorable court, in said foreclosure proceedings, has since his appointment and qualification in December, 1902, spent more than $60,000.00 in enlarging, improving and perfecting said water-works system. Said sum of $60,000.00 was provided to the extent of more than one-half by the issue of receiver's certificates, which constitute a prior lien to that of the bonds for which this plaintiff is trustee, and the residue was provided from income which would otherwise have been payable to the holders of said bonds. Under the conditions brought about by the attitude and conduct of the City of Columbus and existing at the time the present bill was exhibited, the property and franchises, rights and revenues of the said Water Works Company were not then, and are not now of a value sufficient to pay off said sum of $60,000.00, and in addition pay the outstanding bonded indebtedness

of $392,000.00, for which plaintiff is trustee, and by reason thereof the bondholders for whom plaintiff sues as trustee are the only persons interested in the subject matter of said suit, and in the relief prayed by the bill. The plaintiff, and all of the bondholders, whom it represents, are citizens and residents of states other than the State of Georgia. Plaintiff denies that in any of the aforesaid litigation there has been any collusion or contrivance between it and said Water Works Company of any sort or for any purpose whatsoever.

125 II. In answer to the second ground alleged by said defendant, the plaintiff says that the ordinances of the City of Columbus set forth in paragraphs 17, 20 and 24 of plaintiff's said bill, and the acts of the General Assembly of the State of Georgia, set forth in paragraphs 20 and 24 of plaintiff's said bill, under and by virtue of which the action of the said city of Columbus in proceeding to issue bonds for the construction of its own system of waterworks was taken, and all the proceedings of said City of Columbus under said ordinances and acts of the Legislature of Georgia each and all constitute legislation in impairment of the obligation of the contract between said City and said Water Works Company as assignee of said Thomas R. White, in contravention of the Constitution and laws of the United States.

JOSEPH PACKARD,
L. F. GARRARD,
HALL & WIMBERLY,
Solicitors and of Counsel for Mercantile Trust & Deposit Company of Baltimore, Maryland.

UNITED STATES OF AMERICA, *Georgia, Fulton County, ss:*

In person appeared L. F. Garrard, solicitor for respondent, the Mercantile Trust & Deposit Company of Baltimore, and makes oath that the facts stated in the foregoing response are true.

L. F. GARRARD.

Sworn to and subscribed before me this April 15, 1905.

W. C. CARTER,
Clerk U. S. D. Court.

Service acknowledged this April 15, 1905.

T. T. MILLER,
J. H. MARTIN,
ELLIS, WIMBISH & ELLIS,
Solicitors for City of Columbus.

Filed in clerk's office April 15, 1905.

O. C. FULLER, *Clerk.*

126 *Order Dismissing Case.*

In the Circuit Court of the United States for the Northern District of Georgia, Western Division.

Bill. No. 59.

MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE
v.
THE CITY OF COLUMBUS ET AL.

The above stated cause coming on to be heard on the questions raised concerning the jurisdiction of the court as a court of the United States,

And the defendants having filed a demurrer to the original bill on the ground among others that the court was without jurisdiction for that no Federal question was presented and that the requisite diversity of citizenship did not exist after an alignment of the parties according to interest, which demurrer was overruled by the court.

And the defendants having subsequently filed a motion to dismiss the bill for want of jurisdiction on the ground above stated, and the complainant having filed and submitted its response to said motion, and said motion and said response having come on to be heard, and having been heard, argued and considered; and the court being now at this stage of the case of the opinion that it is without jurisdiction of the cause, for the reasons and upon the grounds stated in said motion to dismiss, and that the motion to dismiss should be sustained.

It is thereupon considered, ordered and decreed by the court that the motion to dismiss for want of jurisdiction is hereby sustained on the grounds in said motion stated.

It is further ordered and decreed that the original bill and
127 the amendment thereto be dismissed at the cost of the complainant.

Inasmuch as the complainant has given notice of an appeal to the Supreme Court of the United States, it is hereby allowed thirty days from this date within which to perfect such appeal.

Dated and signed this 29th day of April, 1905.

WM. T. NEWMAN,
United States Judge.

Filed in clerk's office 29 April, 1905.

O. C. FULLER, *Clerk.*
By N. A. BROWN, *Deputy.*

128 *Petition for Appeal.*

The Circuit Court of the United States for the Western Division of the Northern District of Georgia.

In Equity. No. 59.

THE MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE, Plaintiff,
v.
THE CITY OF COLUMBUS, L. H. CHAPPELL, Mayor; E. P. DISMUKES, J. I. DARBY, W. C. LAWRENCE, J. D. McPHAIL, N. L. DUDLEY, L. T. JONES, R. WEILAND, J. T. MONTRIES, J. L. NEWMAN, W. J. HARTMANN, L. A. CAMP, F. M. SOMMERKAMP, E. J. WYNN, J. H. McKNIGHT, MAX BANNER, T. E. MITCHELL, Aldermen; and THE COLUMBUS WATER WORKS COMPANY, Defendants.

The above-named plaintiff, The Mercantile Trust & Deposit Company of Baltimore, conceiving itself aggrieved by the order and decree by the above-named court in the above-entitled cause, under date of April 29th, 1905, wherein and whereby it was considered ordered and decreed by the court that the motion filed in said cause by the City of Columbus, defendant above-named, to dismiss the said bill of complaint, as amended, for want of jurisdiction on the ground or grounds in said motion stated, was sustained by the court, and wherein and whereby it was ordered and decreed that the said original bill, as amended, be dismissed at the cost of complainant upon said motion to dismiss for want of jurisdiction, and wherein and whereby the court held and determined that the court was without jurisdiction of the case, for the reasons, and upon the grounds stated in said motion, comes now, during the term of court, at which said order and decree was made and entered, and within the time allowed by said order to perfect an appeal, and does hereby appeal from said order and decree to the Supreme Court of
129 the United States as provided by Section 5 of the Act of Congress of March 3rd, 1891, Chapter 517, in cases in which the jurisdiction of the Court is in issue, and prays that this appeal may be allowed, and that the question of jurisdiction, and such question alone, shall be certified to the Supreme Court for decision, and that a transcript of the record, proceedings and papers, necessary and material to the decision of said question of jurisdiction, duly authenticated, may be sent to the Supreme Court of the United States, together with a certificate of the Judge, certifying the question of jurisdiction conformably to said Act of Congress.

Plaintiff files herewith an assignment of errors.

Dated this 26th day of May A. D. 1905.

JOS. PACKARD,
HALL & WIMBERLY,
L. F. GARRARD,
Attorneys for Mercantile Trust and Deposit Company of Baltimore.

Order Allowing Appeal.

And now to-wit, on May 26th, 1905, it is ordered that the appeal be allowed as prayed for, and the question of jurisdiction is certified as therein prayed in the certificate upon the question of jurisdiction which is made a part of the record, and which will be sent up as a part of the proceedings.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's Office 26 May, 1905.

O. C. FULLER, *Clerk.*
By N. A. BROWN, *Deputy.*

130 *Assignment of Errors.*

The Circuit Court of the United States for the Western Division of the Northern District of Georgia.

In Equity. No. 59.

THE MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE, Plaintiff,
v.
THE CITY OF COLUMBUS and Others.

The Mercantile Trust & Deposit Company of Baltimore the appellant in connection with its petition for appeal in the above-entitled cause, and in connection with the certificate of the question of jurisdiction whereby said question of jurisdiction is certified to the Supreme Court of the United States from the said Circuit Court of the United States for the Western Division of the Northern District of Georgia for decision, presents and files therewith its assignment of errors as to which question of jurisdiction this appellant says, that the order and decree entered herein on the 29th day of April A. D. 1905 dismissing said cause for want of jurisdiction, is erroneous for the following causes, and upon the following grounds to-wit:

First: That the court erred in sustaining the said motion to dismiss the bill for want of jurisdiction, and in dismissing the said bill upon the grounds stated in the said motion.

Second: That the court erred in holding upon the motion of the said defendant, The City of Columbus to dismiss the said bill as amended for want of jurisdiction that there was no jurisdiction of the Circuit Court of the United States in said cause, for the
131 reason that under the averments of the said bill, and the amendment thereto there was and is no federal question involved on which the jurisdiction of the court can be sustained.

Third: That the court erred in holding, ordering and decreeing, that the said court had no jurisdiction of the said cause under said bill, and the amendment thereto, on the ground of diversity of citizenship, and in holding, adjudging and decreeing, that there

is no such diversity of citizenship as is requisite to sustain the jurisdiction of the court.

Fourth: That the court erred in dismissing the said bill as amended for want of jurisdiction on the ground that there is no such diversity of citizenship as is requisite to sustain the jurisdiction of the court, for that the Columbus Water Works Company, while nominally a defendant, should be aligned with the plaintiff according to interest, and the said Water Works Company is a corporation and citizen of the same State as the City of Columbus.

Fifth: That the court erred in holding that the said Circuit Court of the United States was without jurisdiction, and in dismissing said cause for want of jurisdiction on the ground that there is no federal question involved on which the jurisdiction of the court can be sustained independently of diversity of citizenship, for that the action of the City of Columbus in proceeding to issue bonds for construction of its own system of water works constituted at most a mere breach of the contract, not equivalent to legislation affecting or impairing the obligation of the contract between the City and The Columbus Water Works Company as assignee of Thomas R. White in contravention of the Constitution and laws of the United States.

132 Sixth: That the court erred in holding that the court was without jurisdiction, and that the said bill be dismissed on the ground set up by the City of Columbus in the aforesaid motion to dismiss said bill for want of jurisdiction, viz: on the ground that there is no such diversity of citizenship as is requisite to sustain the jurisdiction of the court for that, The Columbus Water Works Company, while nominally a defendant, should be aligned with the plaintiff according to interest, and the said Water Works Company is a corporation and citizen of the same State as said defendant, City of Columbus, and that there is no federal question involved on which the jurisdiction of said court can be sustained independently of diversity of citizenship, for that the action of the City in proceeding to issue bonds for construction of its own system of water works, constituted at most a mere breach of the contract, not equivalent to legislation, affecting or impairing the obligation of the contract between the City and The Columbus Water Works Company as assignee of Thos. R. White, in contravention of the Constitution and laws of the United States. Which ruling appellant assigns as error.

Seventh: That the court erred in not overruling the said motion to dismiss the said bill for want of jurisdiction, and in not holding that the said court had jurisdiction of the case made by said bill.

Eighth: That the court erred in not overruling the said motion to dismiss the bill for want of jurisdiction for the reason set forth in the first paragraph of the response of appellant, The Mercantile Trust & Deposit Company of Baltimore to the motion to

133 dismiss, and in not holding that there was the requisite diversity of citizenship upon the facts shown in the said bill, and set forth in said response, viz: that as appears from the said original bill, paragraph 20 thereof, the plaintiff filed its bill

in said Circuit Court on Dec. 22nd, 1902 against said Columbus Water Works Company for the foreclosing of the mortgage of said company to the plaintiff as trustee, a copy whereof is attached to said original bill, marked Exhibit "A," and afterwards when this appellant filed the present bill against said City of Columbus, and the other named defendants, the said Columbus Water Works Company was made a co-defendant; and the interest which appellant represents as trustee in the present litigation is in no sense the same as that of the said Water Works Company, but, on the contrary, is separate and distinct therefrom, and adverse thereto, and the relief which its seeks is such as it is itself entitled to ask, and will redown directly and exclusively to the benefit of the bondholders it represents as trustee, and not to the benefit of the said Water Works Company; and the receiver of said Water Works Company, appointed by the court in said foreclosure proceedings, since his appointment and qualification in Dec. 1902 up to the time of the filing of said m[illegible] to dismiss, spent more than $60,000.00 in enlarging, impro[illegible] and perfecting said Water Works system; which said sum of $6[illegible],000.00 was provided to the extent of more than one-half by the issue of the receiver's certificates, which constitute a prior lien to that of the bond for which appellant is trustee, and the residue was provided from income, which would otherwise have been payable to the holders of said bonds; and under the conditions brought about by the attitude and conduct of the City of Columbus, and existing at the time the present bill was brought, the property and
134 franchises, rights and revenues of the said Water Works Company were not then, nor are the same now, of a value sufficient to pay off said sum of $60,000.00, and in addition pay the outstanding bonded indebtedness of $392,000.00, for which this appellant is trustee, and by reason thereof, the bondholders for whom plaintiff sues as trustee, are the only persons interested in the subject matter of said suit, and in the relief prayed by the bill; and appellant and all the bondholders were and are citizens and residents of states other than the State of Georgia, and there has been no collusion or contrivance in any of said litigation between this appellant and said Water Works Company of any sort for any purpose whatsoever. All of which was duly set up and brought to the attention of the Court in and by said response.

Wherefore appellant says that the court erred in holding that it appeared from the averments of the bill, and in view of the uncontradicted averment of said response that there was an improper arrangement of parties, and that the bill should be dismissed for want of diversity of citizenship.

Ninth. That the court erred in holding that the ordinances of the City of Columbus set forth in paragraphs 17, 20 and 24 of the said bill of complaint, and the Acts of the General Assembly of the State of Georgia set forth in paragraphs 20 and 24 of plaintiffs said bill, under and by virtue of which the action of the said City of Columbus in proceeding to issue for the construction of its own system of water works was taken, and the proceedings of said City of Columbus under said ordinances and Acts of the Legislature of

Georgia set forth in said bill did not constitute and do not consitute legislation in impairment of the obligation of the con-
135 tract between said City and said Water Works Company, as assignee of said Thomas R. White in contravention of the Constitution and laws of the United States.

Tenth. That the court erred in holding that the averments of said bill failed to present a federal question, and in holding that under the said bill there was not a controversy arising under the laws and Constitution of the United States, and no jurisdiction of the Circuit Court of the United States by reason of there being a federal question involved.

Eleventh. That the court erred in not holding that the averments of the said bill made a case under the impairment of contract clause of the Constitution of the United States, and in not holding that the said Circuit Court of the United States had and has jurisdiction by reason of the federal question so presented.

Wherefore appellants pray that the order and decree of said Circuit Court dismissing said bill on the ground of want of jurisdiction, be reversed, and set aside, and the cause re-instated, and ordered to proceed to the end that the rights of the appellant set up by said bill may be enquired of and determined, and relief granted according to equity and good conscience.

J. PACKARD,
HALL & WIMBERLY,
L. F. GARRARD,
Attorneys for Mercantile Trust and Deposit Company of Baltimore, Appellant.

Above assignment of errors submitted, allowed and filed this May 26th, 1905.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office 26 May, 1905.

O. C. FULLER, *Clerk,*
By N. A. BROWN, *Deputy.*

136 *Certificate of the Judge.*

The Circuit Court of the United States for the Western Division of the Northern District of Georgia.

In Equity. No. 59.

THE MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE, Plaintiff,
vs.
THE CITY OF COLUMBUS and Others.

In this cause I hereby certify that to the original bill, filed by the complainant, The Mercantile Trust & Deposit Company of Baltimore, in the above entitled cause, the City of Columbus, defend-

ant therein, filed a demurrer upon the ground, amongst others, that this court was without jurisdiction of the controversy, for that no federal question was presented, and independently of such question, the requisite diversity of citizenship did not exist after an alignment of parties according to interests as such interests appeared on the face of the bill. Thereafter said bill of complaint was by leave of the court, amended, and a demurrer was interposed by the City of Columbus to the bill as amended; said last mentioned demurrer being in addition to the demurrer theretofore filed by the same defendant.

Thereafter the demurrer having been duly set down for argument, and having been argued by counsel, the court on the 8th day of December, 1903, upon consideration thereof, overruled said demurrer on each and every ground set forth therein, including the jurisdictional ground, and an order overruling the same was on said date duly entered.

Thereafter the cause came on to be heard in due course before the master, after answer, and replication, an order of reference
137 duly made, and evidence was taken before the master, and the master filed his report on the various questions of law and fact involved. To this report exceptions were filed by both parties, and argument was had before the court. Before briefs of argument were submitted to the court, and before a decision by the court upon the questions raised by the exceptions, the City of Columbus filed its motion to dismiss the said bill, as amended, for want of jurisdiction on the ground or grounds following to-wit:

First. Because there is no such diversity of citizenship as is requisite to sustain the jurisdiction of this court, for that the Columbus Water Works Company while nominally a defendant should be aligned with the plaintiff according to interest, and the said Water Works Company is a corporation and citizen of the same state as this defendant.

Second. Because there is no federal question involved on which the jurisdiction of this court can be sustained independently of diversity of citizenship, for that the action of the city in proceeding to issue bonds for construction of its own system of water works constituted at most a mere breach of the contract not equivalent to legislation affecting or impairing the obligation of the contract between the city and the Columbus Water Works Company as assignee of Thomas R. White, in contravention of the Constitution and laws of the United States.

To this motion to dismiss for want of jurisdiction, the plaintiff, The Mercantile Trust & Deposit Company of Baltimore, filed and submitted its response, which is a part of the record in said cause, and which the court directs that the clerk certify and send up as a part of the proceedings. Said response, as well as the said
138 motion to dismiss, were considered by the court after having been heard and argued.

The court being at this stage of the case, of the opinion that the court was without jurisdiction of the cause, for the reason stated in said motion to dismiss, and that the motion to dismiss for want of jurisdiction should be sustained, upon the ground stated in said

motion to dismiss, the court thereupon on the 29th day of April 1905 by an order and decree, made and entered in said cause on said date sustained the said motion to dismiss for want of jurisdiction on the grounds in said motion stated, and dismissed the said bill and the amendment thereto at the cost of the complainant, upon the ground of want of jurisdiction, the ground being that stated in said motion, and hereinbefore set forth.

I further certify that the order of dismissal herein made is based solely on the ground that no federal question was involved, and that the bill, in my opinion, disclosed the infraction of no right arising under or out of the Constitution or laws of the United States, there being, in my opinion, no such diversity of citizenship after alignment of the parties, according to interest, as would sustain the jurisdiction independently of a federal question.

I further certify that treating the said motion to dismiss as presenting the question of jurisdiction, and acting upon said motion, and upon the view entertained by the court, the suit is dismissed only for want of jurisdiction for the reasons above stated, that is, that the suit in the opinion of the court is not one upon which the court can entertain jurisdiction upon the ground of diversity of citizenship independently of the federal question claimed to be involved,
139 and that the controversy is not one arising under the laws and Constitution of the United States, and there is consequently no jurisdiction of the Circuit Court of the United States.

I further certify that the original bill, including exhibits, the amendment thereto, the demurrer to the bill and amendment, the order overruling the demurrer, the opinion of the court, the motion to dismiss for want of jurisdiction, the response of the plaintiff to said motion to dismiss for want of jurisdiction, the bill brought by The Merchantile Trust & Deposit Company of Baltimore against the Columbus Water Works Company in this court, filed therein December 23rd, 1902, referred to in the above-mentioned bill, and the order of the court sustaining said motion to dismiss for want of jurisdiction, and dismissing the bill for such want of jurisdiction, constitute all of the record and papers in the cause relating to the question of jurisdiction, which alone is certified to the Supreme Court from this Court for decision.

This certificate is made conformably to the first clause of Sec. 5 of the Act of Congress of March 3rd, 1891, Chapter 517, and the record last hereinbefore specified will be certified and sent up as a part of the proceedings, together with this Certificate.

This 26th day of May, A. D. 1905.

WM. T. NEWMAN,

District Judge Holding the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

Filed in clerk's office 26 May, 1905.

O. C. FULLER, *Clerk*,
By N. A. BROWN, *Deputy*.

140 *Appeal Bond.*

The Circuit Court of the United States for the Western Division of the Northern District of Georgia.

In Equity. No. 59.

THE MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE, Plaintiff,
vs
THE CITY OF COLUMBUS and Others.

Know all men by these presents, that we, The Mercantile Trust & Deposit Company of Baltimore as principal, and J. W. English as surety, are held and firmly bound unto the above-named, the City of Columbus, L. H. Chappell, mayor, E. P. Dismukes, J. I. Darby, W. C. Lawrence, J. D. McPhail, N. L. Dudley, L. T. Jones, R. Weiland, J. T. Montries, J. L. Newman, W. J. Hartmann, L. A. Camp, F. M. Sommerkamp, E. J. Wynn, J. H. McKnight, Max Banner, T. E. Mitchell, aldermen, and The Columbus Water Works Company, in the sum of five hundred dollars ($500.00) to be paid to the said defendants named, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this the 26th day of May, in the year of our Lord one thousand nine hundred and five.

The condition of this bond is such that whereas the above named Mercantile Trust & Deposit Company of Baltimore has prosecuted and appealed to the Supreme Court of the United States to reverse the order and decree made and entered in the above entitled suit by the Circuit Court of the United States for the Western Division of the Northern District of Georgia on the twenty-ninth (29th)
141 day of April 1905, wherein and whereby said bill was dismissed for want of jurisdiction and said appeal having been entered upon the question of jurisdiction, which question of jurisdiction has been duly certified to the Supreme Court of the United States from the said Circuit Court of the United States for the Western Division of the Northern District of Georgia for decision.

Now, therefore, the condition of this obligation is such that if the above named Mercantile Trust & Deposit Company of Baltimore shall prosecute said appeal to the effect and answer all damages and costs, if said Mercantile Trust & Deposit Company failed to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, [L. S.]
By J. PACKARD, HALL & WIMBERLY, L. F. GARRARD,
Attorneys at Law.
J. W. ENGLISH. [L. S.]

Sealed and delivered and taken and acknowledged this 26 day of May, 1905, before me.

R. A. HENDERSON,
[SEAL OF N. P.] *Notary Public, Fulton Co., Ga.*

Approved by:
WM. T. NEWMAN, *U. S. Judge.*

Filed in clerk's office 26 May, 1905,
O. C. FULLER, *Clerk,*
By N. A. BROWN, *Deputy.*

142 *Citation.*

The Circuit Court of the United States for the Western Division of the Northern District of Georgia.

In Equity. No. 59.

THE MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE, Plaintiff,
vs.
THE CITY OF COLUMBUS and Others.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The City of Columbus, L. H. Chappell, mayor, E. P. Dismukes, J. I. Darby, W. C. Lawrence, J. D. McPhail, N. L. Dudley, L. T. Jones, R. Weiland, J. T. Montries, J. L. Newman, W. J. Hartmann, L. A. Camp, F. M. Sommerkamp, E. J. Wynn, J. H. McKnight, Max Banner, T. E. Mitchell, aldermen and The Columbus Water Works Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal, duly allowed by the Circuit Court for the Western Division of the Northern District of Georgia, and filed in the clerk's office of said court on the 26th day of May, A. D. 1905, in a cause wherein The Mercantile Trust & Deposit Company of Baltimore is appellant, and you appellees, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Said appeal having been taken by the said appellant from the order and decree of the said Circuit Court of the United States made and entered in the above-entitled cause under date of April
143 29th, 1905, wherein and whereby said bill was dismissed on the ground of want of jurisdiction of the court, and the appeal being taken conformably to the provision of the Act of Congress of March 3rd 1891, Chapter 517, touching the appeal to the Supreme Court from the Circuit Court of the question of jurisdiction, duly

certified to the Supreme Court from the court below for decision.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 26th day of May, in the year of our Lord one thousand nine hundred and five.

WM. T. NEWMAN, *U. S. Judge.*

Due and legal service of the above and foregoing Citation is hereby acknowledged, and all other and further service and notice of Citation, or of the above mentioned appeal is hereby waived.

This 26th day of May, A. D. 1905.

T. T. MILLER,
J. H. MARTIN,
ELLIS WIMBISH,
Att'ys for Defendants other than the Columbus Water Works Co.
COLUMBUS WATER WORKS COMPANY,
By FRANK U. GARRARD,
Secretary and Att'y at Law.

Filed in clerk's office 26 May, 1905,

O. C. FULLER, *Clerk.*
By N. A. BROWN, *Deputy.*

144 UNITED STATES OF AMERICA,
Northern District of Georgia, Western Division, ss:

I, Olin C. Fuller, Clerk of the United States Circuit Court in and for the Northern District of Georgia, Western Division, Fifth Circuit, do hereby certify that the foregoing pages numbered from 1 to 143, inclusive, contain a full, true, correct and complete transcript of the following papers, to-wit: Original Bill, including exhibits; the amendment thereto; the demurrer to the Bill and Amendment; the order overruling the demurrer; the opinion of the Court; the motion to dismiss for want of jurisdiction; the response of the plaintiff to said motion to dismiss for want of jurisdiction; the Bill brought by the Mercantile Trust & Deposit Company of Baltimore against Columbus Water Works Company in this Court, filed therein December 23rd, 1902, referred to in the above-mentioned Bill; the order of court sustaining said motion to dismiss for want of jurisdiction, and dismissing the Bill for such want of jurisdiction; the petition for appeal, the assignment of errors, the certificate of the Judge, the appeal bond, and the citation; which constitute all of the record and papers in the cause relating to the question of jurisdiction, which alone is certified to the Supreme Court, in the cause wherein The Mercantile Trust & Deposit Company of Baltimore, Trustee, was complainant, and The City of Columbus, L. H. Chappell, mayor, E. P. Dismukes, J. I. Darby, W. C. Lawrence, J. D. McPhail, N. L. Dudley, L. T. Jones, R. Weiland, J. T. Monterief, J. L. Newman, W. J. Hartmann, L. A. Camp, F. M. Sommerkamp, E. J. Wynn, J. H. McKnight, Max Banner, T. E. Mitchell, aldermen, and The Columbus

Water Works Company, were respondents, as appear of record and on file in my office.

145 In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the city of Columbus, in the Northern District of Georgia, Western Division, in the Fifth Circuit, this 5th day of June, in the year of our Lord one thousand nine hundred and five.

[Seal U. S. Circuit Court, West'n Div., N. D. Georgia.]

OLIN C. FULLER, *Clerk.*

Endorsed on cover: File No. 19,805. N. Georgia, C. C. U. S. Term No. 303. The Mercantile Trust & Deposit Company of Baltimore, Appellant, *vs.* The City of Columbus, L. H. Chappell, Mayor, *et al.* Filed June 17th, 1905. File No. 19,805.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

No. 60

Office Supreme Court U
FILED
DEC 11 1905
JAMES H. McKENNEY,
C

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, APPELLANT,

vs.

CITY OF COLUMBUS *et al.*

Opposition of Appellant to Motion to Advance Case Under Rule 32.

JOSEPH PACKARD,
JOHN I. HALL,
OLIN J. WIMBERLY,
L. F. GARRARD,
COUNSEL FOR APPELLANT.

ATLANTA, GA.
The Franklin Printing and Publishing Company
Geo. W. Harrison, Manager
1905

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 303.

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, *Appellant*,

vs.

CITY OF COLUMBUS *et al.*

OPPOSITION OF APPELLANT TO MOTION TO ADVANCE CASE UNDER RULE 32.

The Mercantile Trust and Deposit Company of Baltimore, appellant in the above entitled cause, being advised that the City of Columbus will move that said cause be advanced under Rule 32, and heard under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals, comes now and prays leave to resist and oppose said motion, and respectfully submits this its specification of grounds of opposition to said motion, as follows, towit:

I.

That the case is not one falling under Rule 32, according to the spirit and true intent and meaning of said rule. While the appeal is taken to this Court from the United States Circuit Court upon a question of jurisdiction certified to this Court

agreeably to the first clause of Section 5 of the act of March 3, 1891, Chapter 517, familiarly known as the Evarts Act, yet as the jurisdiction of the Court below was invoked upon the ground that the case involved the construction and application of the Constitution of the United States, and on the ground that the law of the State of Georgia mentioned and set forth in the appellant's bill of complaint was, as appellant claimed, in contravention of the Constitution of the United States, and as this is the question of jurisdiction certified to this Court from the Court below for decision, the effect of the decision by this Court of said question of jurisdiction will necessarily involve a decision of constitutional questions which constitute grounds of, and give the right to, a direct appeal to this Court from said Circuit Court under the fourth and sixth clauses of Section 5 of said Act. And it is appellant's insistence that it is not within the spirit and purpose of Rule 32, that a case involving grave constitutional questions and uniting three of the six grounds on which a direct appeal lies to this Court from the Circuit Court, should be tried and determined upon motion and summarily without the privilege and benefit of oral argument on the part of appellant.

II.

That in a case of this character, where jurisdiction of the Circuit Court is invoked upon the ground thatt he suit arises under the Constitution of the United States, and the constitutional questions upon which jurisdiction turns are such as entitle a party to a direct appeal to this Court under the fourth and sixth clauses of Section 5 of Evarts Act, and at a late stage of the case and after the accumulation of a large record the bill is dismissed for want of jurisdiction based upon a determination of the constitutional questions adversely to the contentions of plaintiff, and an appeal by plaintiff under the first clause of said Section 5 presents the constitutional questions clearly and fully,

and a decision by this Court upon the question of jurisdiction will of necessity be a direct and complete decision of the constitutional questions upon which jurisdiction hinges, it is not according to the spirit and meaning of Rule 32, that by adopting the less cumbersome form of appeal furnished in cases where jurisdiction is in issue, a party should be held to have disentitled itself to the benefit of oral argument and a hearing according to the usual rules. The case which is certified to this Court from the Court below for decision is a case in which a law of the State of Georgia is claimed to be in contravention of the Constitution of the United States, and involves the construction and application of the Constitution, and it is upon these grounds the claim of jurisdiction is based. A decision of the case on this appeal adversely to appellant is necessarily a final determination of appellant's claim that the aforementioned law of the State of Georgia is in contravention of the Constitution of the United States, and involves a construction and application of the Constitution adversely to appellant's contention. Appellant could not under any other form of appeal have raised these questions more clearly, fully or completely. Appellant insists that it is not the purpose of Rule 32 to render compulsory a resort to a different form of appeal presenting in reality the same question for decision, but at a far greater burden of expense to litigants, and of labor to counsel and the Court.

III.

That by reason of the nature of the case and the gravity and importance of the questions involved, appellant prays that the Court in the exercise of its discretion do not hear and determine the case under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals, as permitted in cases falling within Rule 32, but hear the case regularly, and

with the privilege of oral argument under the usual rules. And appellant shows for cause :

That as appears from the facts certified and sent up to this Court from the Court below this appellant as plaintiff on July 30th, 1903, exhibited its bill in the Fifth Circuit Court of the United States for the Northern District of Georgia (Western Division) against the City of Columbus, a municipal corporation in Georgia, its mayor and aldermen, and the Columbus Waterworks Company. The bill averred that plaintiff was by the Water Company on January 1, 1891, constituted trustee for holders of $500,000 of its bonds ($392,000 of which were issued and sold), to secure payment of which it conveyed to plaintiff as trustee all the property then owned by it, or thereafter to be acquired, including the contract between the City of Columbus and the Water Company, being in the form of an ordinance, set forth in the bill, of which a copy was annexed. The bonds were issued to provide funds to construct and complete a system of waterworks as called for by the contract between the City and the Water Company, and enable the Water Company to comply with the contract. The works were accepted by the City, and the city was furnished with fire protection and a water supply for its inhabitants for a number of years under the contract. The City knew that the money was to be realized from the issue and sale of bonds, and to make such bonds more attractive agreed by a provision of the contract to accept the due coupons for taxes. The City as a part of the contract obligated itself not to erect waterworks of its own during the life of the contract, but granted to the Water Company the exclusive franchise of maintaining and operating waterworks during the thirty years the contract covered, unless the works were sooner purchased by the City, as the contract gave it the right to do. The City by the contract obligated itself during the time aforesaid to take and pay for the water furnished for fire protection at the price stipulated and to levy a tax for the purpose, and the contract contained a number of provisions designated to secure purity and wholesomeness of water, the stipulated pressure,

needful enlargements and extensions, and other features designed for the due protection of the city and its inhabitants and the Water Company. The City Charter gave the City the power to provide its inhabitants with water for domestic use, as well as to provide the city with water for fire protection. The contract was valid and binding, and the Water Company complied faithfully with its obligations thereunder. The contract provided tests. The bonds were purchased upon the faith of the contract and derived their value therefrom. After the contract had been in force and the stipulated rentals paid for a number of years, the City of Columbus, in September, 1902, passed an ordinance to provide for the construction of a system of waterworks of its own for the purpose of supplying the City and its inhabitants with water, and the issue of bonds to provide the necessary funds. Pursuant to the provisions of such ordinance, an election was held whereby the proposition submitted by the ordinance was carried by a sufficient majority of the legal voters. The City was proceeding to sell the bonds and build the waterworks for the purpose of operating the same to supply itself with water for fire protection, and to furnish water to its inhabitants for domestic use. It was averred by the bill that the ordinance aforesaid was a law impairing the obligation of said contract. It was further shown by the bill that the General Assembly of the State of Georgia passed an Act on the 3d day of December, 1902, granting the City of Columbus permission and authority to erect its own waterworks, and supply its inhabitants with water, and furnish water for fire protection, contrary to and in impairment of the obligation of the aforesaid contract. It was averred that this was a law impairing the obligation of the contract.

It appeared from the bill that by reason of said ordinance and said statute, and the action had and threatened thereunder, the value of said Water Company's property, constituting the bondholders' security, would be greatly diminished and practically destroyed; that the value of the property was derived from the contract and the fact of the company's having no competition; that the company could not successfully compete with the city

itself in supplying water to the city and its inhabitants; that the City's action had destroyed the Company's credit, and its ability to make necessary additions and repairs and meet the interest on its bonds; that the Water Company finding itself, by reason of the City's action, unable to pay interest on its bonds and successfully carry on its business, and notifying the plaintiff, trustees for bondholders, plaintiff instituted a bill for foreclosure in the aforesaid Circuit Court of the United States, and a receiver was appointed of said Water Company; and at the instance of bondholders and with money furnished by them large extensions and improvements had been made with a view to allay any possible dissatisfaction, and preserve the benefits of the contract and this valuable property from destruction by the city's threatened action, and thus save their investment from destruction. Irreparable injury was shown. Injunction was prayed against the sale of the bonds, the erection by the city of its own system of waterworks, the supply of water for fire protection and domestic use, and the other threatened acts in carrying into effect the aforesaid law (ordinance and statute) impairing the obligation of said contract. Jurisdiction was invoked under the impairment of contract clause of the Constitution, and it was claimed by the bill that the aforesaid ordinance and statute were laws of the State in contravention of the Constitution of the United States, and the averments of the bill made a case, as appellant insists, which involved the construction and application of the Constitution of the United States.

After the hearing upon the application for injunction and the grant of an injunction, a demurrer to the bill was upon argument overruled December 8th, 1903, on each and all the grounds, including a jurisdictional ground similar to the ground of the motion to dismiss subsequently made; and an order overruling the same was on said date duly entered.

The defendant, the City of Columbus, answered, and the cause came on to be heard in due course, after answer and replication, and a general order of reference duly made. Evidence was taken before the Master, and the Master filed his report upon the various questions of law and fact involved. To this

report exceptions were filed by both parties, and argument was had thereon before the Court. After the argument, but before the time for filing briefs had expired, the City of Columbus filed a motion to dismiss the bill for want of jurisdiction, on the ground that there was no such diversity of citizenship as was requisite to sustain jurisdiction, and that there was no federal question involved on which the jurisdiction of the court could be sustained "for that the action of the city in proceeding to issue bonds for construction of its own system of waterworks constituted at most a mere breach of the contract not equivalent to legislation affecting or impairing the obligation of the contract between the City of Columbus and the Columbus Waterworks Company, as assignee of Thomas R. White, in contravention of the Constitution and laws of the United States."

The plaintiff having submitted its response, which is in the record certified, and which was considered by the Court, the said motion to dismiss for want of jurisdiction was on April 29, 1905, sustained.

As appears from the facts certified to this Court, the appellant, as trustee for bondholders, and with their consent, subsequently to the passage of the aforesaid ordinance and statute averred to be in impairment of the obligation of said contract, and by reason of the conditions brought about thereby, procured to be expended by the receiver of the Court appointed under the aforesaid foreclosure proceedings, more than $60,000, about one-half of which was raised upon receiver's certificates to which the bonds are postponed, and the remainder drawn from income to which the bondholders would have been otherwise entitled. Said expenditures were authorized while bondholders, through their trustee, were endeavoring to protect the aforesaid contract against impairment, and at a time when the decisions of said Court, based it was believed upon the decisions of this Court, justified them in believing that the rights which they claimed under the Constitution of the United States authorized the expenditure.

By amendment to the bill filed before the hearing of the

application for injunction, bondholders had offered through their trustee to furnish whatever amount of money the Court might deem needful to enlarge and extend the waterworks system to meet future needs of the city as well as present needs.

The constitutional questions made by the bill, and upon which jurisdiction is invoked, are grave and weighty, urged in good faith, and, we believe, this Court will recognize to be not without merit.

Upon their decision rests the preservation or destruction of the $392,000 invested in these bonds, upon the faith of the constitution's protection of contract obligations against impairment by law.

Of the six classes of cases which are deemed sufficiently important to be the subject of direct appeal to this Court from the Circuit Courts, one relates to final decisions and decrees in prize cases, one to capital crimes, and four to ordinary civil cases. Of the four, three are united in the present appeal, included in which number is perhaps the most important of the four, namely, a case in which the law of a State is claimed to be in contravention of the Constitution of the United States.

And appellant believing that oral argument is necessary in order to properly and adequately present these questions to the Court, prays that the benefit and privilege of oral argument be not denied.

And for as much as the case is one in which appellant is given the right to take an appeal direct to this Court by reason of the constitutional questions involved, and the time of appeal on such grounds has not yet expired, appellant prays that in the event the Court may hold that appellant is not entitled to be heard by oral argument by reason of the form of appeal adopted, the Court may permit appellant, within such number of days as may be fixed by the Court, to enter an appeal bringing up the entire cause, in the manner provided in cases in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States, and that

the entering of the present appeal may not be taken or held to prejudice the rights of appellant to a full hearing on such other appeal.

All of which is respectfully submitted.

JOSEPH PACKARD,
JOHN I. HALL,
OLIN J. WIMBERLY,
L. F. GARRARD,
Counsel for Appellant.

FILE COPY.

FILED
OCT 19 190
JAMES H. McKEN

BRIEF FOR APPELLANT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 50.

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, *Appellant*

vs.

THE CITY OF COLUMBUS, L. H. CHAPPELL, MAYOR, ET AL.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

JOSEPH PACKARD,
LOUIS F. GARRARD,
JOHN I. HALL,
OLIN J. WIMBERLY,
Counsel for Appellant.

Filed October , 1906.

(19,805.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 50.

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, *Appellant*

vs.

CITY OF COLUMBUS, *Appellee.*

BRIEF FOR APPELLANT.

In this case the Mercantile Trust and Deposit Company of Baltimore, as trustee under the mortgage of the Columbus Water Works Company to secure its bonded indebtedness, filed a bill on December 22d, 1902, in the Circuit Court of the United States for the Western Division of the Northern District of Georgia, for the foreclosure of the mortgage and the appointment of a receiver. The City of Columbus having proceeded, in pursuance of an Act of the Legislature of Georgia passed December 3d, 1902, to take steps looking to the erection of a municipal water works system, the said Mercantile Trust Company of Baltimore, as trustee, on July 30th, 1903, filed in the same Court the original bill in this case for an injunction against the City, on the grounds that such action of the City constituted legislation impairing the obligation of the contract

of the City with the Water Works Company, which was part of the property conveyed to it as mortgagee; and was intended to deprive the bondholders of their property without due process of law; and for the specific performance of the said contract. The City, on the 11th of September, 1903, filed a demurrer upon the ground, amongst others, that the Court was without jurisdiction of the controversy, for that no federal question was presented, and independently of such question, that the requisite diversity of citizenship did not exist, after an alignment of parties according to interests as such interests appeared on the face of the bill. Thereafter the bill of complaint was by leave of the Court amended, and a demurrer was interposed by the City of Columbus to the bill as amended; said last mentioned demurrer being in addition to the demurrer theretofore filed by the same defendant.

The demurrer having been argued by counsel, the Court, on the 8th day of December, 1903, overruled said demurrer on each and every ground set forth therein, including the jurisdiction ground.

After answer and replication the case was referred to the Master, and evidence having been taken before him, he filed his report on the various questions of law and fact involved. To this report exceptions were filed by both parties and argument was had before the Court. Before briefs of argument were submitted and before a decision by the Court upon the questions raised by the exceptions, this Court decided the case of *City of Dawson vs. The Columbia Avenue Safe Deposit, &c. Company*, (197 U. S. 178,) whereupon the City of Columbus filed its motion to dismiss the bill, as amended, for want of jurisdiction, on the grounds following:—

First. Because there is no such diversity of citizenship as is requisite to sustain the jurisdiction of the Court; for that the Columbus Water Works Company, while nominally a defendant, should be aligned with the plaintiff according to interest, and the said Water Works Company is a corporation and citizen of the same State as the city of Columbus, defendant.

Second. Because there is no federal question involved on which the jurisdiction of the Court can be sustained independently of diversity of citizenship; for that the action of the city in proceeding to issue bonds for construction of its own system of water works constituted at most a mere breach of the contract, not equivalent to legislation affecting or impairing the obligation of the contract between the city of Columbus and the Columbus Water Works Company as assignee of Thomas R. White, in contravention of the Constitution and laws of the United States.

To this motion to dismiss for want of jurisdiction, the plaintiff, the Mercantile Trust and Deposit Company of Baltimore, filed its response, which was considered by the Court, and which the Court directed to be certified and sent up as a part of the record herein.

The Court being, at this stage of the case, of the opinion that it was without jurisdiction of the cause, for the reasons stated in said motion to dismiss, and that the motion to dismiss for want of jurisdiction should therefore be sustained, thereupon, by an order and decree made and entered on the 29th day of April, 1905, sustained the motion to dismiss on the grounds in said motion stated, and dismissed the said bill and the amendment thereto at the cost of the complainant. From this order and decree this appeal is taken.

There are eleven assignments of error. The first and seventh raise generally the question of error in sustaining the motion to dismiss and in not overruling the same. The second, fifth, ninth, tenth and eleventh present specifically the question of error on the part of the Court in deciding that no federal question was involved in the bill. The third, fourth and eighth present the question of error in deciding that the Court had no jurisdiction arising out of the diversity of citizenship. The sixth urges error in holding, on these two grounds combined, that there was no jurisdiction. The eighth and ninth assignments present, in fuller detail than elsewhere, the grounds relied on by the appellant as showing error of the Court below

in dismissing the bill for lack of diversity of citizenship and for lack of existence of a federal question, respectively, and the attention of the Court is therefore specially directed to these two assignments.

I.

EIGHTH ASSIGNMENT, AS TO DIVERSITY OF CITIZENSHIP.

Unlike the case of the *City of Dawson vs. The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company*, decided in this Court on March 6th, 1905, (197 U. S. 178) there had been no litigation between the appellant and the city of Columbus, or between the Columbus Water Works Company, mortgagor of the appellant, and the city of Columbus, prior to the institution by the appellant of the suit in the Circuit Court of the United States for foreclosure and receiver on December 22, 1902. That bill is part of the record in this case, and examination will show that, both in the foreclosure proceedings and in the original bill in this case,

> "the interest which the appellant represents is in no sense the same as that of the Columbus Water Works Company; but, on the contrary, is separate and distinct therefrom, and adverse thereto, and the relief which the appellant seeks is such as it is itself entitled to ask, and will redound directly and exclusively to the benefit of the bondholders which it represents as trustee, and not to the benefit of the Water Works Company."

It further appears from the response of the appellant to the motion of the city of Columbus to dismiss the original bill in this case for want of jurisdiction, that

> "the receiver of said Water Works Company, appointed by the Court in said foreclosure proceedings, since his appointment and qualification in December, 1902, up to the time of the filing of said motion to dismiss, spent more than $60,000 in enlarging, improving and perfecting said Water Works system; which said sum of $60,000 was provided

to the extent of more than one-half by the issue of receiver's certificates, which constitute a prior lien to that of the bonds for which appellant is trustee, and the residue was provided from income, which would otherwise have been payable to the holders of said bonds; and under the conditions brought about by the attitude and conduct of the City of Columbus, and existing at the time the present bill was brought, the property and franchises, rights and revenues of the said Water Works Company were not then, nor are the same now, of a value sufficient to pay off said sum of $60,000, and, in addition, pay the outstanding bonded indebtedness of $392,000, for which this appellant is trustee; and, by reason thereof, the bondholders for whom appellant sues as trustee are the only persons interested in the subject matter of said suit, and in the relief prayed by the bill; and appellant and all the bondholders were and are citizens and residents of States other than the State of Georgia, and there has been no collusion or contrivance in any of said litigation between this appellant and said Water Works Company of any sort or for any purpose whatsoever." (Record, page 70.)

All of the above having been duly set up and brought to the attention of the Court in and by said response, the appellant claims that, in view of the averments of the bill and of the uncontradicted averments of the response, the Court below erred in holding that there was an improper arrangement of parties, and that the bill should be dismissed for want of diversity of citizenship.

In the case now before the Court, we find a non-resident trustee for non-resident bondholders proceeding in a United States Court against a Georgia public-service corporation, to obtain possession of the property, which is security for the bonded indebtedness. Included in this property is a contract with a Georgia city. It becomes necessary for the trustee to take action to protect and enforce this contract, and it institutes

proceedings in the same United States Court against the city. The public-service corporation is joined as a party defendant, in order that the trustee may be subrogated to its rights under the contract. It is difficult to perceive how the diversity of citizenship is less clear in the second suit than in the first, or how the adverse position to the public-service corporation in the first suit is changed into a friendly position in the second. Such a claim for subrogation is, in itself, hostile.

> "Subrogation is not assignment. The most that can be said is, that the subrogated creditor, by operation of law represents the person to whose right he is subrogated. * * * The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the the mischief or reason of the law."
>
> *New Orleans vs. Gaines' Admr.*, 138 U. S. 606.

The allegation of diversity of citizenship in this case is in the bill which is verified by affidavit.

Hawes vs. Oakland, 104 U. S. 453.

And there is nothing on the face of the bill, or elsewhere in the proceedings, to suggest collusion between the plaintiff and the Columbus Water Works Company, one of the defendants. In all the cases where the Federal Courts have refused to exercise jurisdiction on the ground that the allegation of diversity of citizenship was collusive, such collusion or contrivance has been clear and manifest. See, for instance, *Detroit vs. Dean*, 106 U. S. 541. In the present case the absence of any collusion, or of any reason for collusion, is manifest throughout.

Another important consideration is to be noted in this case. By the amendment to the bill now under review the appellant undertook to make any improvements or additions to the water works plant which might be deemed by the Court requisite to full compliance with the contract with the city of Columbus.

After the demurrer to the jurisdiction, upon the same grounds now urged, had been overruled, the Court, as already shown, by orders passed in the foreclosure suit, directed the receiver to make certain improvements in the plant, amounting to a large sum, at the expense of the bondholders. It admits of question whether, under all the circumstances, the precedents will support the claim that the bill for injunction and specific performance of the contract can be treated as an ancillary proceeding to the bill for foreclosure.

Root vs. Woolworth, 150 U. S. 411.

But, certainly, when the two cases are so closely linked together as in the present instance and action adverse to the complainant, growing out of the situation developed in the second suit, has been taken in the first suit where the jurisdiction of the Court is unquestionable, it would seem inequitable that afterwards jurisdiction in the second suit should be denied. The Court through its receiver, under a proceeding *in rem*, had possession of the property, including the contract which is in question here. It would seem proper that every intendment should be made to support the jurisdiction of the Court over this contract and the parties thereto.

II.

Ninth Assignment, as to the Federal Question.

It is submitted that the legislation set forth in this case as impairing the obligation of the contract, is clearly distinguishable from the legislation which, in *St. Paul Gas Light Company vs. St. Paul*, 181 U. S. 142, this Court held not to be such legislation as impaired the obligation of the contract in that case. The ordinances of the city of Columbus, set forth in paragraphs 17, 20 and 24 of the bill in this case, and the Acts of the General Assembly of Georgia, set forth in paragraphs 20 and 24 of the bill, (Record, pages 8, 10, 11), under and by virtue of which the action of the city of Columbus in proceeding to issue bonds for the construction of its own system of

water works was taken, clearly constituted legislation impairing the contract between the city and the water works company, and this contract the appellant, as trustee of the bondholders, was in duty bound to seek to uphold. This case is closely analogous in this respect to *Walla Walla vs. Walla Walla Water Company*, 172 U. S. 17. All the legislation embraced in the ordinances and Acts of the Legislature above mentioned was subsequent to the contract between the city of Columbus and the Columbus Water Works Company, as assignee of Thomas R. White, which was made on the 7th of October, 1881.

In paragraph sixteen of the bill in this case (Record page 7,) it appears that under the contract in question, the city of Columbus granted to the Water Works Company the exclusive privilege of maintaining and operating water works in said city for a period of thirty years or until such time as they might be purchased by the city under terms of arbitration as to value, provided in said contract. This is in effect a stronger provision than those of which this Court said in the *Walla Walla* case, page 17:

> "They amount simply to this; that if the city should desire to establish water works of its own it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith." (Page 17.)
>
> "Cases are not infrequent where under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a par-

ticular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party." (Page 18.)

At the time of the contract with White in 1881, the exclusive feature of the contract had been held legal by the decisions of the highest Court of Georgia. (See opinion of Court below, Record, page 60.)

Even if, as in the case of *Vicksburg Water Works Co. vs. Vicksburg*, 185 U. S. 81, we lay aside the Act of the Legislature of Georgia, passed on December 3d, 1902, the ordinance of the city of Columbus passed on September 14th, 1902, and the subsequent ordinances giving effect thereto, "disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract," to use the language of this Court in the *Vicksburg* case. See also—

New Orleans Water Works Co. vs. Rivers, 115 U. S. 680.

Such an ordinance "may properly be considered a law within the meaning of the article of the Constitution of the United States."

New Orleans Water Works Co. vs. Louisiana Sugar Refining Co., 125 U. S. 31.

St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 148 and cases cited.

Even in the case of an appeal from the highest State Court, this Court will determine for itself "as to the existence and meaning of the alleged contract, in order to determine the ques-

tion whether subsequent legislation has impaired the obligation thereof."

Capital City Light &c. Co., vs. Tallahassee 186 U. S. 406.

It is respectfully submitted that the Federal Court had jurisdiction based upon the allegations of the bill, even though it be held that the Columbus Water Works Company should have been aligned as plaintiff. It would have had such jurisdiction, even though all the parties had been citizens of Georgia. "All that is necessary to establish the jurisdiction of the Court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair." Such is the language of this Court where all the parties were citizens of the same State.

City Railway Co. vs. Citizens Railway Co., 160 U. S. 673.

Walla Walla vs. Walla Walla Water Co, 172 U. S. 7.

New Orleans Water Works Co. Rivers, 115 U. S. 680.

"The easement is a legislative grant, whether made directly by the Legislature itself or by any one of its properly constituted instrumentalities. * * * Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one."

City Railway Co. vs. Citizens Railroad Co., supra.

Where the bill properly sets forth a contract granting exclusive rights to furnish water, and that the action of the city tends

to impair the obligation of such contract, the case is one where the Federal Courts have jurisdiction without regard to the citizenship of the parties.

Knoxville Water Co. vs. Knoxville, 200 U. S. 22.
Vicksburg v. Vicksburg Water Works Co., 202 U. S. 453.
Vicksburg Waterworks Co. vs. Vicksburg, 185 U. S. 65.

Respectfully submitted,

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FILE COPY.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 50.

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, APPELLANT,

vs.

THE CITY OF COLUMBUS, L. H. CHAPPELL, MAYOR, ET AL., APPELLEES.

SUPPLEMENTARY BRIEF FOR APPELLANT.

JOSEPH PACKARD,
O. J. WIMBERLY,
Of Counsel for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23602

(19,805.)

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SUPPLEMENTARY BRIEF FOR APPELLANT.

At the end of this brief we append a copy of the act of the General Assembly of Georgia, of December 3, 1902, authorizing the city of Columbus to construct, own, and operate its system of waterworks, and alleged by the bill to be legislation impairing the obligation of the contract claimed to exist, and to constitute the security of the bondholders for whom complainant sues as trustee.

I.

The bill raises a Federal question, which, as we contend, gives the circuit court jurisdiction, irrespective of the question of diversity of citizenship. This contention we trust we have made clear in the original brief.

There are, however, certain views advanced in the brief for appellees to which we wish to make more explicit reference.

We do not join issue with opposing counsel as to the correctness of the legal proposition that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, "if it plainly appears that such averment is not real and substantial."

The above language, taken from the opinion of this court in the Newburport case (193 U. S.), is merely the converse statement of the principle several times laid down by the court as the rule determining the question of jurisdiction:

"The jurisdiction of the circuit court is established when it is shown that the company had or claimed to have a contract with a State or municipality which the latter had attempted to impair, and so long as the claim is apparently made in good faith and is not frivolous, the case can be heard and decided on the merits."

Pacific Electric Railway Company *vs.* Los Angeles, 194 U. S., 112.

City Railway Company *vs.* Citizens' Street Railroad Company, 166 U. S., 557.

Illinois Central Railroad Company, 180 U. S., 28.

The above inquiry upon a logical analysis resolves itself into two branches, which constitute its primary elements:

1. Does the bill show that the Waterworks Company had, or plaintiff claims that it had, a contract with the municipality, and is the claim one which is apparently made in good faith and which is not frivolous?

2. Is there legislation of the State or municipality impairing or "attempting to impair" the contract which it is claimed exists?

Perhaps the latter proposition is not stated quite as broadly as this court, in using the above language, means to state it. The language, "so long as the claim is apparently made in good faith and is not frivolous," would seem to have reference to both elements or terms of the compound proposition; and a claim apparently made in good faith and not frivolous,

that the attempted impairment exists, gives the court jurisdiction to determine that question. The question whether there is in fact such impairment or attempted impairment is not jurisdictional, but goes to the merits—that is to say, is a matter proper to be determined by the court after disposing of the question of jurisdiction.

The latter proposition would, under this view, be as follows:

2. Is it claimed by plaintiff that there is legislation of the State or municipality impairing or attempting to impair the obligation of the contract, and is such claim one which apparently is made in good faith and is not frivolous?

We do not, however, deem it necessary to consider which of these two more accurately states the meaning of the rule.

In any view, we think a comparison of the facts of the case made by the bill with the Vicksburg case, recently decided, will make it perfectly plain that there has been legislation within the rule.

II.

Of the two elements the existence of which gives jurisdiction, the motion to dismiss, according to the words in which it is couched, draws in question only the second jurisdictional element, namely, whether there has been legislation which can be regarded as impairment of the contract, if such contract exists. Those grounds of demurrer which go to the contract itself are left out of the motion to dismiss.

The motion (omitting so much as relates to the question of diversity of citizenship) asked to dismiss for want of jurisdiction—

"Because there is no federal question involved on which the jurisdiction of this court can be sustained independently of diversity of citizenship, for that the action of the city in proceeding to issue bonds for construction of its own system of water works constituted at most a mere breach of the contract not equivalent to legislation affecting or im-

pairing the obligation of the contract between the city and the Columbus Waterworks Company as assignee of Thomas R. White, in contravention of the Constitution and laws of the United States."

It will be noticed that the motion assumes, and apparently concedes, the existence of a valid contract.

There is no hint that there will be any contention that there is no valid contract, nor even a claim of contract apparently made in good faith and not frivolous.

The brief for appellees in this court, however, raises certain objections and makes certain criticisms more or less directly aimed at the contract itself or to particular features of it.

An examination of these objections, however, will, we think, make it clear that they go not to the jurisdiction of the court, but go rather to the merits on questions which may be raised by appropriate pleadings as affirmative defenses, to be dealt with by the court after the preliminary question of jurisdiction is disposed of. Instead of going to the jurisdiction, a determination of these questions presupposes jurisdiction.

We do not, therefore, deem it necessary at this place to refer further to any of these objections, save only the objection that the power of the municipality to make the contract is founded rather upon a general authority possessed by all Georgia municipalities, under the general language, or, as it is sometimes called, the "general welfare clause," of their charters, as consistently held by the highest court of the State throughout its entire history, and does not rest upon specific legislation in express terms conferring the power or defining the method in which it shall be exercised.

Counsel for appellee do not question the existence of the power, but they seek to draw a distinction between the constitutional protection against impairment afforded to contracts named in terms in some special statute, or so described in some specific words of a special statute directing the municipality to enter into the contract, and the protection afforded

by the constitution to other contracts authorized by valid laws, but not specifically named or referred to in a special statute or special grant of power.

We are unable to see how this can make any difference. If the contract was valid when made, it is entitled to protection against impairment, and we deem it to be entirely immaterial whether the contract was authorized by general law or general language in a particular charter or specific words by way of a particular grant contained in a special statute dealing with this specific subject and no other.

The Georgia law touching the authority of municipalities to make contracts for water supply is clearly stated by the Supreme Court of the State in City of Dawson *vs.* Water Co:

"That a municipal corporation may exercise the power of taxation for the purpose of providing its inhabitants with water for domestic use, as well as to provide the city with water, is the settled law of this State, and is not questioned in the present case (Citing *Frederick v. Augusta,* 5 Ga., 561; *Rome v. Cabot,* 28 Ga., 50; *Wells v. Atlanta,* 43 Ga., 67). A supply of water for these purposes may be procured by a municipal corporation either by building itself the works necessary for the purpose or by making a contract with other persons to supply the same. In *Lott v. Waycross, supra,* this court held that a municipal corporation could contract an indebtedness for supplying lights to a town, without submitting the question to a vote of the people."

City of Dawson *vs.* Dawson Waterworks Company, 106 Ga., 696, p. 709 of opinion.

In that case, as well as in the cited cases, the court was dealing with charters which contained no specific words granting the power, but the power was deduced from the general words used in all municipal charters, the so-called "general-welfare clause."

III.

The motion to dismiss, predicated, as it is, solely upon the proposition "that the action of the city in proceeding to

issue bonds for construction of its own system of water works constituted at most a mere breach of the contract, not equivalent to legislation affecting or impairing the obligation of the contract," rests, we think, upon a misconception of what was decided by this court in the Dawson Waterworks case (197 U. S., 178).

Passing over the fact that in that case (differing in this respect from the case at bar) the first step of the city was to repudiate the contract and to refuse to pay, and that in the opinion of the court this repudiation and continued refusal constituted the gist of the city's conduct complained of by the bill, "and the other acts were subsequent, subordinate to, and in aid of them," and that the principal fact, and not the secondary, subordinate acts, should determine whether the case fell on the same side of the line with the St. Paul case, or on the same side with the Walla Walla case, it will be seen that the decision was based on a failure of the more loosely drawn pleading to develop and make clear in that case what is distinctly pleaded and made perfectly clear in the present bill.

In the Dawson Waterworks case this court says:

"In the case before us there was no legislation subsequent to the contract, and it is not even shown that there is color of previous legislation for the city's acts. Those acts are alleged to be unawful, and the allegation would be maintained by showing that they were not warranted by the laws of the State."

In the case at bar the conduct of the city begins with no refusal to pay. There is in the ordinance no refusal to pay or any denial that it owes for the water consumed.

The ordinance is a submission to popular vote of the proposition that the city build its own system of waterworks, issuing a designated amount of bonds "for the purpose of building, establishing, equipping and operating a system of waterworks," and providing for the levy of an annual tax for the purpose of paying off the principal and interest of the bonds, and contains elaborate provisions for carrying the

legislative scheme fully into effect, creating "a separate and distinct department of the city government," consisting of four members to be elected by the people, and of the mayor as an *ex officio* member, who "shall be known as the water commission, and said commission shall have control of the building, operating and management of the water works" (Record, p. 49). This elaborate piece of legislation by ordinance, attached to the bill as an exhibit, fills four full pages of the printed record (pages 46, 47, 48, 49).

It is shown by the bill both that there was "legislation subsequent to the contract" and "color of previous legislation for the city's acts."

"Legislation subsequent to the contract" is found in the act of the General Assembly of December 3, 1902, a copy of which is appended at the end of this brief. This act of the General Assembly is distinctly pleaded in the bill, alleged to be legislation or attempted legislation impairing the obligation of the contract; the contract, the obligation impaired, and the manner in which it is impaired are all distinctly pointed out, and protection is claimed and jurisdiction invoked under the impairment-of-contract clause of the Constitution and also under the Fourteenth Amendment.

The "color of previous legislation for the city's acts" is also shown.

The ordinance, referred to in the bill and attached thereto as an exhibit, shows that the proposition was submitted to the voters "in accordance with the laws of this State," and that the ordinance was to become effective in the event the voters at such election gave the required assent and after the bonds so authorized "shall have been validated as by law required."

The bill also pleads and sets forth as an exhibit the ordinance adopted after the foregoing ordinance received the required assent of the voters and became operative as a law; which later ordinance directs that bids be invited for the bonds, and this advertisement is also pleaded and attached to the bill as an exhibit.

It is recited therein:

"The issue and sale of these bonds have been authorized by the qualified voters of the city of Columbus at an election held on the 4th day of December, 1902, as provided by law, pursuant to sections 377 to 381, inclusive of vol. 1 of the Civil Code of Georgia for 1895, and pursuant to the provisions of the constitution as embodied in paragraphs 1 and 2 of section 7, article VII. Said bonds have been validated and confirmed by the judge of the superior court of Muscogee county, in conformity with an act of the General Assembly of Georgia, approved December 6th, 1897 (See Acts 1897, p. 82), which judgment of validation has been passed upon and affirmed by the Supreme Court of Georgia."

Record, p. 51.

In the same exhibit reference is also made to the aforementioned act of the General Assembly.

The section of the Georgia constitution referred to is as follows:

ARTICLE 7, SECTION 7, PARAGRAPH 1. *"Debt of Counties and Cities Not to Exceed Seven per cent.*—The debt hereafter incurred by any county, municipal corporation, or political division of this State, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase at any time the amount of said debt three per centum upon such assessed valuation."

"PAR. 2. *County and City Bonds, How Paid.*—Any county, municipal corporation, or political division of this State, which shall incur any bonded indebtedness under the provisions of this constitution shall, at or before the time of so doing, provide for the assessment and collection of an an-

nual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness."

Civil Code of Georgia (ed. 1895), §§ 5893, 5894 (vol. 2).

Section 377 of volume 1 of the Code of Georgia, above referred to, is as follows:

"377 (508*i*). *Notice of Election on Issue of Bonds.*— When any county, municipality or division shall desire to incur any bonded debt, as prescribed in paragraphs 1 and 2, section 7, article 7, of the constitution of 1877, the election required shall be called and held as follows, to wit: The officers charged with levying taxes, contracting debts, etc., for the county, municipality or division, shall give notice for the space of thirty days next preceding the day of election, in the newspaper in which the sheriff's advertisements for the county are published, notifying the qualified voters that on the day named an election will be held to determine the question whether bonds shall be issued by the county, municipality or division. In said notice he shall specify what amount of bonds are to be issued, for what purpose, what interest they are to bear, how much principal and interest to be paid annually, and when to be fully paid off."

The other laws referred to would needlessly swell the brief. They are laws of the State, and the ordinance was adopted under color of these laws.

As held by the highest court of the State in Heilbron *vs.* Cuthbert, 96 Ga., 312, and City of Dawson *vs.* Waterworks Co., 106 Ga., *supra,* a city which has passed an ordinance of this character and proceeded to obtain the assent of the voters, as provided by the foregoing section of the State constitution and the foregoing public laws, acquires thereby the power and authority to erect and maintain its own system of waterworks.

And this without the assistance of a special statute such as the City of Columbus was acting under in this case.

It was therefore shown in the case at bar that there was "color of previous legislation for the city's acts."

Under such circumstances a municipal ordinance is legislation within the meaning of the impairment-of-contract clause of the Constitution.

That an ordinance of this character is legislation within the meaning of the Constitution has been too often decided to longer admit of question.

Davis & Farnum Mfg. Co. *vs.* Los Angeles, 189 U. S., 207, 216, 217, and citations.

St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 142, 148.

Walla Walla case, 172 U. S., 1, 10.

The Dawson Waterworks case holds nothing which is in conflict with this well-established principle. It merely holds that, in the absence of anything to show that the city's acts were in pursuance of legislative authority or under color of legislative authority, an averment in the bill that the city's acts are unlawful is consistent with the idea that they were not warranted by the laws of the State.

IV.

The ordinances of the city are not, however, to be considered as standing by themselves, or as deriving their legislative quality simply from the fact that they purport to deal with matters governmental in their character and were passed under color of previous legislative authority.

These ordinances are to be considered in connection with the act of the General Assembly of 1902, with which they form parts of one and the same legislative scheme. From this act they cannot be separated. The act enters into the ordinances, fixes their character, and gives to them their meaning. When the voters of the city of Columbus, on December 4, 1902, voted, they voted not upon the ordinance in the form it passed in council on September 14, 1902, but with all the provisions of the act of December 3, 1902, read into it.

This would necessarily result, even if there were no intention on the part of the city council that it should be so, for the acts of the General Assembly being, relatively to the ordinances of the city, the higher law, the ordinances must give way where there is conflict or take on additions and new features wherever the statute so enacts.

But it appears that there was an intention on the part of the city that the State should legislate. Under Code, section 377, above quoted, the election would have been held four weeks from the date of the ordinance—that is to say, four weeks from September 14, 1902—but for the fact that the date was fixed far enough ahead to permit of the desired legislation. It was known, of course, what day the legislature would meet; it was known also what day would be the first day for local bills under the rules, and it is a known fact that local bills, when favored by the local representatives, go through without opposition as matter of legislative courtesy. It was therefore a very simple matter to calculate ahead just when the bill would become a law, and the election was fixed for the next succeeding day, December 4, 1902.

The act of December 3, 1902, is complete in itself. It in terms authorizes the city of Columbus to construct, own, operate, and maintain its own system of waterworks. It works out the entire scheme to the minutest details. It creates officers and administrative machinery. It would require no popular election or municipal ordinance to complete the scheme, but for the constitutional and statutory requirements that all municipal bond issues must receive the preliminary sanction of a popular vote.

Thus we have:

1. A constitutional provision constituting a sort of referendum.

2. Legislative statutes carrying out this constitutional purpose and giving to ordinances receiving such popular sanction the force of law.

3. Charter power to adopt the ordinance and submit it to the voters for their ratification.

4. An ordinance, a submission, an election, an adoption by the people, and a further ordinance declaring the result.

5. Validation by the superior court and the Supreme Court.

6. A special law by the General Assembly confirming and completing the legislative scheme above set forth.

All these cover such important governmental functions as taxation, expenditure of public revenues, incurring of municipal indebtedness, creating of new municipal offices, to be filled at newly authorized elections; fire protection, water supply for drinking and other domestic purposes, street sprinkling, sewerage, and, lastly, the destruction, ruthlessly and needlessly, of $400,000 of property, invested upon the faith of the city's solemn obligation, in order to carry out a public-service contract valid when made, according to the laws of the State as interpreted by the decisions of its highest court up to that time.

If all this conjunction of State constitution, general statutes, charter, special statute, ordinance, referendum, validation by courts, etc., does not collectively rise to the dignity of legislation, it is difficult to conceive just what it would take to constitute legislation within the meaning of the impairment-of-contract clause of the Constitution.

V.

It is, however, argued on behalf of appellees that the act of December 3, 1902, cannot be construed as either authorizing the city's action or as a ratification by the State of any previous action on the part of the city which would otherwise be illegal; that the city's right to build waterworks existed

under the general provisions of its charter, without the need of drawing any aid or vitalizing force from the act of December 3, 1902, and was founded upon laws in existence when the contract was made; and that therefore the act of December 3, 1902, cannot be regarded as legislation impairing the obligation of the contract between the city and the Waterworks Company.

This argument, it seems to us, loses sight of more than one important consideration.

1. In the first place, the city of Columbus did not, at the time the act of December 3, 1902, was passed, possess the right to construct and operate a system of waterworks of its own. Granted that the general-welfare clause in its charter gave it the power to exercise the power of taxation for the purpose of providing its inhabitants with water for fire protection and for domestic use, and that it could procure a supply of water for these purposes either by building itself the works necessary for the purpose or by making a contract with other persons to supply the same; but when the city adopted the latter of these modes and entered into a binding contract with the Waterworks Company or its assignor, by which it granted the Waterworks Company the exclusive right of furnishing water for the aforesaid purposes during the period stipulated, the city's right and power to build its own waterworks was held temporarily in abeyance by reason of the obligation of its contract. The operation of the higher law contained in the Constitution had the effect of superseding the powers deduced from the general-welfare clause of the city's charter, so far as the latter came into conflict with the impairment-of-contract clause of the Constitution. We likewise grant that there were general laws authorizing the city to proceed in a specified manner to incur a bonded indebtedness. But this is subject always to the proviso that a city which has by contract granted to a water company the exclusive right during a limited time of furnishing water

for fire protection and for the domestic use of its inhabitants has no right or power under these general laws to incur a bonded indebtedness for the purpose of doing what the impairment-of-contract clause of the Constitution forbids it to do.

It is no reply, as opposing counsel argue, that the act of the legislature of the State could only authorize the city to proceed lawfully, not in contravention of the Constitution by a disregard of any valid contract obligation. It is true that the State statute, though in positive and unequivocal terms purporting to confer upon the city the authority to build and operate waterworks of its own, cannot authorize the city to proceed in contravention of law by a disregard of any valid contract obligation. But this is true only for the reason that the Constitution furnishes a barrier too high for it to leap over and too strong for it to break through. It is made the duty of the national courts in a peculiar sense to defend that barrier, and wherever a statute comes from the proper source and possesses the outward semblance of law, and would be effective as law but for the barrier interposed by the Constitution, a party claiming a right under the Constitution is entitled to invoke the aid of the national courts; and where the amount in controversy is sufficient he is permitted to do this in a national court of first resort.

If, as argued by counsel, the act of the legislature, though in terms broad enough to authorize the city to build its own waterworks, did not in fact authorize it to proceed "in contravention of law by a disregard of any valid contract obligation," it can only be because the Constitution interposes a bar to prevent, and this fact furnishes a reason for the exercise by the national courts of a jurisdiction suitably invoked and not a reason for declining jurisdiction; and whether there is a valid contract obligation is a matter for the national courts to determine for themselves, where the bill makes a case which renders such determination necessary and the claim is apparently made in good faith and is not frivolous.

2. In the second place, granting that the city might have proceeded to erect waterworks under general laws and in the exercise of the power conferred upon it by the general-welfare clause of its charter, yet it must be conceded that the General Assembly had the amplest power to legislate upon the subject (leaving out of view, of course, the question of the contract rights protected by the Constitution), and such ligislation would bind the city. It will not be denied that, because the charter may have already given the city the right to provide a water supply in any way it might see fit, it was entirely competent for the legislature to amend the charter and limit the city to a particular way, thereby excluding all other ways previously open to it and defining and making special a power which before that was general (provided only, of course, nobody's constitutional rights were thereby violated). The legislature could fix a power which before that was floating. Will it be said that this is not legislation, and that when the city proceeds to erect its waterworks it need not proceed under this legislation, but may act as though such legislation did not exist? If, then, there is in force a valid contract which obliges the city to take all of its water from a water company, and grants the water company the exclusive privilege of furnishing water for a period of time which has not yet expired, and the act of December 3, 1902, authorizes the city before the expiration of that time to build and operate waterworks of its own, notwithstanding the city's obligation not to do so, this act clearly is legislation or attempted legislation impairing the obligation of the contract.

3. We think counsel's argument leads logically to this dilemma:

If the City of Columbus, under the rules recognized in the Dawson Waterworks case (197 U. S., *supra*), passed the ordinance for the construction of its waterworks under authority of previous legislation, then such ordinance was itself a law within the meaning of the impairment-of-contract

clause of the Constitution. If no such authority existed, then the act of December 3, 1902, was legislation within the meaning of this constitutional provision.

VI.

It is argued that the act of December 3, 1902, was subsequent in time to the ordinance of the city for the erection of its own system of waterworks.

We are at a loss to see what difference it can make whether the ordinance preceded the statute or the statute preceded the ordinance. They are so chained together as to constitute one legislative act.

We, however, dispute the proposition that the statute is to be regarded as subsequent in time to the ordinance. The ordinance, it is true, was adopted by the city council in September, but it was wholly ineffectual as a law authorizing the construction of waterworks till ratified at the election held December 4.

VII.

It is argued that the act of December 3, 1902, is not a law impairing the contract, because the contract is not mentioned by name therein.

The effect is the same, whether the contract is mentioned or not; for, if the contract obligated the city not to enter the field it had expressly stipulated it would not enter, a law which expressly authorized the city to do the precise thing which the city by its contract had bound itself not to do would impair the obligation of this contract. The result would follow no more absolutely if the contract were mentioned in every section of the statute.

VIII.

Opposing counsel in their brief make the criticism that the bill charges that the ordinances, statute, etc., constitute an "attempt to impair" the obligation of the contract.

This verbal criticism of one detached clause or phrase of the bill will be seen to be without merit when the averments are taken in their entirety.

The words criticized are the correct terms as approved by the decisions. It is more correct to speak of "attempted impairment" than "impairment," because the Constitution says there shall be no impairment, and what the Constitution says shall not be, can be only "attempted," since the Constitution stands in the way of the success of the attempt; and statutes which contravene the Constitution are "color" of legislation and "attempts" at legislation, but they are not law.

The State never passes a law impairing the obligation of a contract, because the Constitution withholds the power. It may "attempt" it; in the history of our country the States have frequently made the attempt, but the Constitution strips all such statutes and enactments of the quality of law.

When the attempt is made, the national courts have jurisdiction, and this involves necessarily the jurisdiction to inquire and determine the question whether in fact such attempt is made.

But we do not understand that it is the office and function of a motion to dismiss for want of jurisdiction to raise objections of this character.

Nice verbal criticisms will not be resorted to by the court in order to sustain a motion to dismiss for want of jurisdiction, made at a late stage of the case, after the evidence has all been taken and the report of the master rendered thereon, particularly where demurrers had been overruled, where the court in a carefully prepared opinion had after a hearing fully sustained the equities of the bill, and thereafter the plaintiff under orders of the court has expended large sums

of money in carrying out the contract which it is the object of the bill to protect against impairment.

The other matters urged in the brief for appellees are, we think, not jurisdictional.

We, however, deem it proper to outline our views in regard to the more important of these questions, and we invite the attention of the court thereto, in the event the court thinks it proper to go into those matters at this time.

1. *Exclusive Franchise.*—The complainant insists that the contract gave to the Waterworks Company, for the period specified in the contract, the exclusive right, by means of its system of waterworks constructed for that purpose, to supply water for the use of the city and its inhabitants, and that the obligation of this contract will be impaired if the city, proceeding under the acts of the legislature and under the ordinances in question, establishes and maintains an independent, separate system of waterworks in competition with those of the Waterworks Company. These questions having been aptly raised by the complainant's bill, "the case is plainly one arising under the Constitution of the United States."

Knoxville Water Company *vs.* Knoxville, 200 U. S., 22, 32.

In that case the court, though holding that the case was one of which the circuit court clearly had jurisdiction, held that the contract did not in fact confer the exclusive right claimed.

The exclusive feature in the contract in the present case is not distinguishable from that in the Vicksburg case.

Section 14 of the contract reads as follows:

"XIV. The mayor and council are to grant a franchise for the exclusive privilege of maintaining and operating the works for a period of thirty (30) years; or until such time as they may be purchased by the city; and during such time

to rent from Thomas R. White the fifty (50) double fire hydrants at an annual rental of eighty (80) dollars each, equal to four thousand ($4,000) dollars per year—payable quarterly; and on future extensions the rate shall be seventy-five ($75) dollars per hydrant; but whenever the number of hydrants shall exceed ten (10) per mile, on any mile of pipe, there shall be a discount of ten per cent. for each additional hydrant on said mile of pipe. In the primary distribution of the fifty hydrants on the line of street mains reference shall be had to the value of property contiguous, and a number of hydrants greater than ten may be placed on a mile of pipe without this reduction in price per hydrant, until additional hydrants, beyond fifty (50) are placed on the original five miles of pipe, when such reduction shall occur on one hydrant for each such addition."

Record, p. 36.

Further aid on this question is to be derived from section 21, which is as follows:

"XXI. The mayor and council reserve the right to the undisturbed use of the four-inch water pipes, connections and attachments, now located on Broad, Randolph, and Front streets, for fire purposes only, the supply of cisterns and engine practice. Said water pipe not to be used for other water supply, or street sprinkling, after the completion of the water works, except with the consent of Thomas R. White."

Record, p. 38.

By ordinance the city subsequently consented to the assignment of the contract to the Columbus Waterworks Company, and accepted the work.

Record, pp. 44, 45.

We think the intent of the contract to grant the exclusive right is perfectly clear.

While the rule is "if on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given it, those doubts are to be solved in favor of the State," the court in so announcing the rule also lays it down that "it is the duty of courts not to defeat the intention of parties

to the contract by a strained interpretation of the words employed by them."

It inheres in the city's power to contract for water supply, to include in such contract as an incident to the principal undertaking a stipulation of this character, whereby the Waterworks Company may be protected against ruinous competition.

Walla Walla, 172 U. S., 1.
Vicksburg, 185 U. S., 65; 202 U. S., 453.

There is nothing in the Georgia law to restrict the broad powers municipal corporations there possess with regard to providing a water supply.

Counsel for appellees cite Georgia Constitution, article 1, section 3, paragraph 2, which is as follows:

"No bill of attainder, *ex post facto* law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities shall be passed."

Civil Code of Georgia, sec. 5730.

This provision has reference, primarily at least, to corporate charters as distinguished from ordinary contracts, and was intended to remove such charters from the operation of the decision in the Dartmouth College case.

It may be doubted whether it was intended to apply to ordinary contracts, even where a city or the State was one of the parties, so as to forbid the parties making such contracts irrevocable.

But if this clause of the constitution relates to contracts like the present one, it is to be read in connection with the next succeeding clause of the same section, which is as follows:

"No grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to the corporators or creditors of the incorporation."

Constitution of Georgia, Art. 1, sec. 3, par. 3; Code, sec. 5731.

The language of the Georgia constitution upon this subject is practically identical with the language of the Mississippi constitution, construed by this court in the Vicksburg case, 202 U. S., 453, 464, 465, and upon this question that case is controlling.

2. *Debt.*—The contention urged in the brief for appellees, that the contract to pay for future water rentals created a debt, we do not deem it necessary to reply to, further than to say that the cases cited were decided subsequently to the making of the contract and subsequently to the deed of trust for bondholders of the Waterworks Company, and under such circumstances this court will determine the question for itself.

The earlier decisions of the Georgia court tend to sustain the direct contrary of the proposition, being in line with the decision of this court in the Walla Walla case.

If the court wishes to pursue the investigation further, we invite the court's attention to the opinion of Judge Newman in the present case.

Record, pp. 59, 60, 61.

3. *Police Power.*—As we understand the position of counsel for appellees, it is their contention that the recital in the preamble to the ordinance of September 14, 1902, that "the Columbus Waterworks Company has totally failed to supply the city of Columbus and its inhabitants with a sufficient quantity of pure and wholesome water," and that "the public health of the city of Columbus is paramount in importance to every other consideration; and the owning by the city of Columbus of her own waterworks would result in a great saving in the cost of fire protection, sanitation, and other purposes," gives to the ordinance the character of an exercise of the police power.

An examination of the ordinance will show, we think, that the foregoing recitals and the other recitals making up the

lengthy preamble were in realty only meant as an address to the voters for campaign purposes.

In the act of the General Assembly there is no such recital or, indeed, any preamble at all.

We do not understand, however, that the preamble changes in any way the character of the ordinance, so far as it affects the right of the party whose contract right it impairs.

If the contract obligation would be impaired without the preamble, it is just as substantially impaired when the preamble is present. Preambles are not exercise of police power.

If a preamble could deprive a law of its character as an impairment of the obligation of a contract, without changing its effect on the contract, preambles would doubtless become frequent, and rights secured by the constitution might find themselves smothered under preambles.

Conceding, however, to the preamble everything that may be claimed for it, this would not, as we understand it, be a matter going to the jurisdiction of the court.

If police power can be urged as a reason why the contract is not impaired, the court must necessarily exercise jurisdiction in order to pass upon such defense.

"Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one."

City Railway Co. *vs.* Citizens' Railroad Co., 160 U. S., cited *supra* in Appellant's Principal Brief.

The police power of a State is subordinate to the constitution, not superior thereto.

Jacobson *vs.* Massachusetts, 197 U. S., 11.

It would not be subordinate to the constitution, but would itself be the supreme law, if the mere claim asserted in a municipal ordinance that the municipality was in the exer-

cise of police power sufficed to divest courts of their jurisdiction at the very threshold.

An examination of the contract will show that a case could hardly arise for which it does not make adequate provision without a resort to police power on the part of the city. The subjects of insufficiency of quantity or of pressure; of interruption of supply; of the need of extension and enlargements; of contaminated or unwholesome water; of change of source of supply; of purchase by the city, and all other questions liable to arise, are minutely dealt with in the contract itself. Had the city been content to act under the contract, and comply with its obligations, there would have been no need of preambles, or popular elections, or the building of waterworks of its own.

To hold that a city's police powers absolve it from a compliance with those provisions of the contract, which were intended to furnish some safeguard against capricious action while at the same time affording to the city the fullest measure of protection would be carrying the doctrine of police powers further than it has yet been carried.

It is suggested in the argument that the bill leaves room for the inference that there has been a failure on the part of the Waterworks Company to comply with the contract on its part.

This, however, is incorrect. The bill avers compliance with the contract on the part of the Waterworks Company and repudiation on the part of the city.

The bill in the foreclosure suit charges that the Waterworks Company has not complied *with the covenant in the deed of trust* to the effect that it would not permit the security to become impaired, but would make useful and proper additions, betterments, and improvements to the waterworks. But the averment is explained and made specific as follows:

"Your orator states that, owing to an unprecedented and protracted drought the sources of supply for the said water-

works have to a large extent failed for the time being; that it is within the power of the said Waterworks Company to provide for such a contingency by seeking and availing itself of other sources of supply, but that, as your orator is informed, owing to the attitude of the City of Columbus, which now is taking steps to provide a water supply of its own, the Columbus Waterworks Company is unable to sell its bonds reserved in its treasury for such purposes and which could have been sold except for the said attitude of said city, and therefore is unable to carry out the betterments and improvement in its water supply above mentioned."

By reason of this inability of the Waterworks Company to sell its bonds, these bondholders found it necessary to foreclose, procure the appointment of a receiver, and consent to the expenditure of $60,000 raised by a diversion of income belonging to them and the postponing of their security to receiver's certificates.

There is no inconsistency in these averments. A failure to deal with a sudden and unlooked-for emergency, by reason of an inability caused wholly by the fault of the city itself, was no breach of the contract.

This, however, is one of the questions which can best be dealt with in the light of the entire evidence, when the case is heard on its merits.

If appellees regard this an appropriate subject-matter for a motion to dismiss for want of jurisdiction, it would have been better to have made it a ground of the motion and thereby have afforded an opportunity to bring up so much of the record as bears thereon.

When the case comes up on its merits it will be shown whether or not the city had ground for complaint.

Respectfully submitted,

JOSEPH PACKARD,
OLIN J. WIMBERLY,
Of Counsel for Appellant.

APPENDIX.

ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, 1902, P. 370.

COLUMBUS, WATER-WORKS FOR.

No. 54.

AN ACT to amend the charter of the city of Columbus, in Muscogee county, and the several acts amendatory thereof, so as to confer power and authority upon said city to construct, maintain, own and operate a system of water-works together with the necessary sites, ways, structures, canals, reservoirs for conveying and containing water, and the laying of pipes, conduits, and mains into and through said city, and the use of any stream or streams of water which may be deemed necessary and appropriate for that purpose, and to cross or lay along any street, or highway such pipes and mains, and appropriate and occupy the same, or any part thereof; to condemn and appropriate private property upon which to locate its works and to lay its pipes and mains, and to acquire and own property, real and personal, for same, both within the corporate limits of said city or anywhere else, and to have the power and authority generally to do and perform all things necessary to carry into effect the objects and purposes of this act; and to provide for the selection and establishment of a commission to be known as the "board of water commissioners," to whom shall be delegated the supervision and control of the construction, management, and operation of said water-works system, and to define the powers, authority and duties of said commission, and for other purposes.

SECTION 1. *Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same,* That the charter of the city of Columbus, in Muscogee county, be, and the same is, hereby amended as follows:

The said city of Columbus is hereby authorized and empowered to construct, build, maintain, own and operate a system or water-works, in any manner and to any extent that may be needful for the present and future use and requirements of said city of Columbus; that said city shall have the power to acquire and hold property, both real and personal, that may be necessary or appropriate for affording a complete and sufficient supply of reasonably pure and wholesome water for its own use and the use of the inhabitants thereof, whether the same be located within the limits of said city, or elsewhere, including the ownership of, and the dominion over, in whole or part, of the watershed or watersheds from which the water to be supplied is gathered, however large the tract of land may be that is requisite for that purpose.

SEC. 2. *Be it enacted by the authority aforesaid,* That the said city shall have power and authority to make or cause to be made such examinations and surveys for the proposed system of water-works contemplated by this act as shall be necessary or proper to the selection of the most advantageous location or locations, site, or sites, watershed or watersheds, right or rights, way or ways, for the location of said works and the necessary apparatus, appliances and equipment therefor, and for bringing the water from the source of supply to and distributing it in said city.

SEC. 3. *Be it further enacted,* That said city of Columbus shall have the power and authority to construct its works, and build such dams, canals, raceways and reservoirs as may be necessary for conveying and containing its water, and the laying of such pipes, conduits and mains into and through said city as may be necessary and appropriate for the distribution of said water for private and public use; shall have the power to use and employ for the purpose of said system of water-works any stream or streams of water, watercourse or watercourses, or any part of such waters which shall be deemed necessary and appropriate; and to use such water or waters by employing the same for power to run or move the necessary machinery, or for pumping through the pipes and mains and making distribution thereof over said city; and generally to do and perform all acts and things necessary for the construction, equipment, maintenance and operation of said system of water-works, and the distribution of its water as may be requisite and proper to carry into effect the object, scope and purposes of this act.

SEC. 4. *Be it enacted by the authority aforesaid*, That said city of Columbus shall have the power in the construction of said system of water-works and in making distribution of its water, to lay its pipes and mains under and along any street or streets of said city, or under and along any road or highway of this State; and should it be necessary, to cross, occupy, and appropriate with its works, pipes and mains such streets and highways, or any part thereof; and shall have the right to use the ground or soil under any road, railroad, highway, street, lane, alley, or court within this State, for the purpose of laying its pipes, conduits and mains, and constructing, enlarging and improving any of the work contemplated by virtue of this Act; provided, however, that said city shall not permanently injure any such railroad, highway, street, lane, alley or court, and the same be restored to its original condition and all damages thereto to be repaired; that said city of Columbus shall have the power to lease, buy, take and condemn any property, real or personal, in this State, as may be necessary for the location, construction, operation and security of said works; said city first making and paying just and adequate compensation therefor, as by law provided when private property is taken for public use.

SEC. 5. *Be it further enacted by the authority aforesaid*, That the rights and remedies of said city and all persons, firms or corporations whose property, franchises, easements or rights said city may seek to condemn or appropriate for the purpose herein contemplated, shall be in accordance with, and subject to, the provisions set forth and embodied in sections 4657 to 4686, inclusive, of the Code of Georgia for 1895, and the several acts of the General Assembly amendatory thereof.

SEC. 6. *Be it enacted by the authority aforesaid*, That said city of Columbus shall have the right and power to supply and furnish its water to private consumers, either for motive power or for drinking, sanitary and domestic purposes, charging such rates therefor as in the judgment of the corporate authorities is reasonable and just.

SEC. 7. *Be it enacted by the authority aforesaid*, That for the purpose of carrying into effect the objects of this act, the said city of Columbus shall have the power to make any contract or contracts or incur any obligation or obligations upon the means and resources of said city not repugnant to the constitution of this State, and shall have the right to issue

and sell its bonds when so authorized in the manner provided by law for the purpose of raising and supplying the necessary means to accomplish the aims and objects of this act.

SEC. 8. *Be it enacted by the authority aforesaid,* That before the said city of Columbus shall commence the construction of said system of water-works, and before the issue and sale of any of its bonds for that purpose, the mayor and board of aldermen of said city, at any regular meeting thereof, shall elect in the same manner as other officers of said city are elected, a board of commissioners, to be known as the "Board of water commissioners," who shall have the supervision and control of the building, construction, operation and management of said water-works system. The mayor and aldermen of said city shall fill all vacancies that may occur in said board at any regular meeting of council after such vacancy may exist, and that said board of water commissioners shall consist of five persons, one of whom shall be the mayor of said city, who shall be an *ex officio* member, and four other persons, all of whom shall be freeholders and citizens of the city of Columbus and qualified by law to vote at elections held for the selection of mayor and aldermen of said city.

SEC. 9. *Be it enacted by the authority aforesaid,* That the term of office of each member of said board of water commissioners shall be four years, except the members of the first board elected to serve; that the first election for members of said board shall be held at any regular meeting of council after the qualified voters of said city of Columbus have legally authorized at an election held for that purpose an issuance of the bonds of said city for the purpose of building and constructing a system of water-works, at which meeting of council the four persons to constitute the first board shall be elected, one of whom shall be elected to serve until the first day of January first following said election, one to serve until the first day of January thence next following, one to serve until the first day of January thence next following, and one to serve until the first day of January thence next following, so that the term of office of only — member will expire each year; and as the respective terms of office of each member of said board of water commissioners expire, the said mayor and board of aldermen of said city of Columbus, at the regular meeting of council to be held in July of each year prior to the expiration of the term of office of each member shall elect

a successor to the member of said board whose term expires in January following thereafter, who shall be elected for the full term of four years, so that one member of said board shall be elected in July of each year.

SEC. 10. *Be it enacted by the authority aforesaid,* That said board of water commissioners shall choose from their number annually one to serve and act as chairman of said board. The members of said board of water commissioners shall each, before entering into the discharge of his duties, take and subscribe to the following oath: "I (name), do solemnly swear (or affirm) that I am duly qualified to serve as a member of the board of water commissioners of the city of Columbus; that I will, to the best of my ability, faithfully discharge all of the duties and obligations devolving upon me as a member of said board without fear, favor and affection, and will subserve the best interests of the city of Columbus, so help me God," which oath shall be taken before any officer authorized by law to administer oaths.

SEC. 11. *Be it enacted by the authority aforesaid,* That a majority of said board of water commissioners shall constitute a quorum for the transaction of business, and all contracts, engagements, acts and doings of said board within the scope of their duty or authority, shall be obligatory upon and be considered in law as if done by the mayor and board of aldermen of said city of Columbus. Said board shall have the power and authority to make rules and regulations for the conduct of its affairs, and shall keep a record in books to be purchased and kept for that purpose of all acts and doings of said board, which said books shall be subject to examination at any time by persons authorized to do so by the mayor and board of aldermen in said city; and said board shall make reports to the mayor and board of aldermen of said city of Columbus of the operation and condition of said water-works in accordance with any ordinance or resolution that may be passed by said mayor and board of aldermen with reference to same.

SEC. 12. *Be it further enacted,* That said board of water commissioners shall have the power to appoint a competent engineer for the construction of said water-works system and to fix his compensation while so employed; also the power to appoint a secretary for said board, and employ such managers, clerks and laborers, as may from time to time be found needful in building and constructing said system and in the

operation thereof when completed, and to fix their salaries and compensation; that said board may purchase from time to time such material, machinery, apparatus and appliances as may be needed in the building, construction, maintenance and operation of said works; that all contracts made by said board for material or for construction of said works, or any part thereof, which shall involve an expenditure of over two hundred dollars, shall be made in writing, and of each contract two copies shall be made, one of which shall be deposited with the clerk of council for the benefit of the mayor and board of said city, and one to be retained by said board, and said board shall have the authority to require from any person or persons firm or corporation with whom they contract, satisfactory security for the faithful performance of said contract, according to its terms, and no member of said board shall be interested directly, indirectly or remotely in any contract relating to the construction or operation of said works.

SEC. 13. *Be it further enacted*, That said board of water commissioners shall regulate the distribution and use of the water in all places and for all purposes whenever the same may be required, and shall fix the price for use thereof and the terms of payment therefor; they shall erect such number of public hydrants and in such places as the mayor and board of aldermen of said city may designate, for the purpose of extinguishing fires, watering the streets, and such other public uses as said mayor and board of aldermen may direct, and shall make all necessary connections with pipes and mains into all buildings used by said city of Columbus and as said mayor and board of aldermen may require. That said board of water commissioners shall have full power and authority to require payment in advance for the use of water furnished by them in or upon any building, place or premises; and in case prompt payment shall not be made, they may shut off the water from such building, place or premises, and shall not be compelled to again supply said building, place or premises with water until all arrears, with interest thereon, shall be fully paid. That said board shall have the power to make rules and regulations respecting the introduction of water into or upon any premises and may regulate the use thereof in such manner as to them shall seem necessary and proper; and the members of said board, and all engineers, superintendents or inspectors in their service and employ, are hereby authorized and empowered to enter at all

seasonable hours any building or other place, where said water is taken and used, and when unnecessary waste thereof is known or suspected, and examine and inquire into the cause thereof. They shall have full power to examine all service pipes, stop-cocks, and other apparatus connected with said works, for the purpose of ascertaining whether the same are of the character and dimensions, and fixed in the manner required by the rules and regulations of said board, and if necessary the supply of water may be shut off until the required examination is made and any alterations and repairs necessary are completed.

SEC. 14. *Be it further enacted,* That whatever sum or sums of money that may be provided by the mayor and board of aldermen of the city of Columbus, either from the sale of bonds or otherwise, for the purpose of building and constructing a system of water-works as herein provided for, shall be paid over to said board of water commissioners, and by them used and paid out for that purpose only, and should any surplus be left thereof after final completion of said system, shall be turned over to the treasurer of said city of Columbus, and by him used only for the payment of principal and interest on any bonds that may have been issued and sold for that purpose.

SEC 15. *Be it further enacted,* That all money coming into the hands of said board of water commissioners from water rents and the sale of any apparatus and appliances or other property, or from any other source, after paying for any necessary extensions, repairs and expenses of operation, shall be paid to the treasurer of the city of Columbus semi-annually and at least fifteen days prior to the time of the payment of any principal or interest that may become due on any bonds that may have been issued for the purpose of building and constructing any system of water-works as is herein provided for, and the same shall be used by said city treasurer only for the purpose of paying any principal and interest then to become due; but if the revenue and receipts of money derived from the operation of said water-works for any year be more than is sufficient to discharge the interest and principal on said bonds maturing in that year, then such surplus may be used and appropriated by the mayor and board of aldermen of said city for any other public improvement in said city as to them may seem proper.

SEC. 16. *Be it further enacted,* That said "board of water commissioners" shall be considered a subordinate branch of

the city government of Columbus, and shall conform in their actings and doings to all ordinances that may be passed by the mayor and board of aldermen of said city of Columbus; and the mayor and board of aldermen of the city of Columbus may at any time remove any member which they may have elected to said board, if it shall satisfactorily appear, after reasonable notice to the parties, and hearing of the causes of complaint and answers thereto, if any should be offered, that the member whose removal is sought has been guilty of maladministration or neglect of the duties of his office, that his removal will be right and proper, and two-thirds of the aldermen of said city council shall concur in such removal.

SEC. 17. *Be it further enacted*, That the members of said board shall not receive any compensation for their services, but shall be paid and refunded all reasonable expense which they may incur in the performance of their duties; that the mayor and board of aldermen of said city shall be authorized, by and through a committee of their own number, or by any person they may select, to inspect at their pleasure, the state and condition of the works, and property thereto belonging, as also all books and accounts pertaining to the affairs conditioned by them, and the said board shall give and furnish them any reasonable facility and assistance in making such inspections.

SEC. 18. *Be it further enacted*, That any person or persons who shall maliciously or willfully divert the water, or any portion thereof, from the works contemplated by this act, or shall corrupt or shall in any manner render the same impure, or shall destroy or injure any canal, aqueduct, pipe, conduit, main, machinery or other property used or required for procuring or distributing the water, such person or persons, and their aiders and abetters, shall forfeit to said board, to be recovered in an action of trespass, treble the amount of damages besides cost of suit which shall appear on the trial to have been sustained, and all such acts are hereby declared to be misdemeanors under the laws of this State, and the person or persons charged therewith, if found guilty, shall be punished as for a misdemeanor, as provided by law.

SEC. 19. *Be it further enacted*, That all laws and parts of laws in conflict with this act be, and the same are, hereby repealed.

Approved December 3, 1902.

FILE COPY.

Office Supreme Court U. S.
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NOV 25 1905
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted]0

MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE, APPELLANT,

vs.

CITY OF COLUMBUS, APPELLEE.

MOTION TO ADVANCE UNDER 32d RULE.

Now comes The City of Columbus, the appellee in the above-entitled cause, and moves the court to advance the hearing in said cause in conformity with rule 32 of the court, for that the cause comes to this court upon the certificate of the court below under section 5 of the act of March 3rd, 1891, chapter 517, the only question in issue being the question of the jurisdiction of the court below.

Wherefore the appellee prays that the cause may be advanced to be heard by this court, in conformity with its rules, on a day hereafter to be noticed for submission by the appellee.

WILLIAM A. WIMBISH,
Of Counsel for Appellee,
525 *Prudential Building, Atlanta, Ga.*

[Endorsed:] File No. 19,805. Supreme Court U. S., October term, 1905. Term No. 303. Mercantile Trust & Deposit Co., &c., app't, *vs.* City of Columbus *et al.* Motion to advance under the 32d rule. Filed Nov. 25, 1905.

FILE COPY.

FILED
OCT 26 1904
JAMES H. MCKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NUMBER 59.

THE MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE,

Appellant.

v.

THE CITY OF COLUMBUS, ET AL.,

Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

BRIEF IN BEHALF OF APPELLEES.

ELLIS, WIMBISH & ELLIS,
J. H. MARTIN,
T. T. MILLER,
Solicitors for Appellees.

(19,805)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

NUMBER 50.

THE MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE,

Appellant.

v.

THE CITY OF COLUMBUS, ET AL.,

Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

BRIEF IN BEHALF OF APPELLEES.

STATEMENT.

It is deemed appropriate to submit a brief statement of what we conceive to be the material facts relating to the jurisdiction of the Circuit Court.

On October 7th, 1881, a contract was entered into between the City of Columbus and one Thomas R. White for the construction and operation of a system of waterworks for the purpose of supplying the City and its inhabitants with water for domestic and sanitary purposes and for fire protection. This contract provided among other things:

That the source of water supply should be selected by White, he guaranteeing, however, that the supply of water both in quality and quantity should be wholesome, constant, and amply sufficient to meet both present and future requirements of the City and private consumers.

Transcript page 35, Sec. X.

That the Mayor and Council of the City should grant a franchise for the exclusive privilege of maintaining and operating the works for a period of thirty years, or until such time as the works might be purchased by the City; and that during such time the City would rent and pay for at a stated price a specified number of fire hydrants.

Transcript page 36, Sec. XIV.

Thomas R. White and his associates organized the Co-

lumbus Waterworks Company under the general laws of the State of Georgia, to which company was assigned the contract with the City of Columbus.

Transcript page 2, Sec. IV.

It is not contended by the appellant that in entering into this contract the City had any express legislative authority, or the sanction of a popular vote. In so contracting the City proceeded in the exercise of its police power, pursuant to the general welfare clause usual in municipal charters. The contract was signed on the part of the City by the Mayor and four other persons whose official capacity does not appear.

Transcript page 44.

In order to secure an issue of $500,000 of bonds, the Columbus Waterworks Company on January 1st, 1891, executed a mortgage to the Mercantile Trust and Deposit Company of Baltimore as Trustee (the appellant here,) creating a lien upon the property and assets of the Waterworks Company, including its franchises and the benefit of its contract with the City of Columbus.

Transcript page 16; pp. 20-22.

Of the bonds so secured $400,000 in amount were issued and disposed of.

Transcript page 2, Sec. II.

On September 14th, 1902, the Mayor and Council of the City of Columbus adopted an ordinance submitting to the qualified voters of the City at an election ordered to be held on December 4th, 1902, the question whether the City should issue $250,000 of negotiable bonds, the proceeds to be used in constructing, maintaining and operating a municipal system of waterworks. In the preamble to this ordinance it was declared that the Columbus Waterworks Company had "totally failed to supply the City of Columbus and its inhabitants with a sufficient quantity of pure and wholesome water;" and it was also declared that the public health was paramount in importance to every other consideration.

Transcript page 46.

The ordinance is otherwise silent respecting the Columbus Waterworks Company, or its contract with the City. There is no repudiation of the contract, nor is any right, privilege or franchise of the Waterworks Company withdrawn or revoked. The ordinance simply

asserts the right of the City to provide its own water supply because the Waterworks Company had failed in its duty in this regard.

The election ordered was held on December 4th, 1902, and the result was declared to be in favor of the issuance of the bonds.

Transcript page 8.

On May 6th, 1903, the Mayor and Council adopted a resolution directing that bids for the purchase of the bonds be invited, the bids to be opened on August 1st, 1903.

Transcript page 50.

Pending the receipt of such bids the original bill in this case was filed on July 30th, 1903.

Other than as herein stated the bill alleges no act on the part of the City which is claimed to be in derogation of the contract.

The General Assembly of the State of Georgia passed an Act, approved December 4th, 1902, authorizing the City of Columbus to construct, maintain, own and operate a system of waterworks, and providing the machin-

ery requisite for the full execution of the purpose in view.

Acts of 1902, page 370.

This Act contains no reference, direct or remote, to either the Columbus Waterworks Company or its contract with the City.

It is not claimed in behalf of the appellant that the City has taken any step in the pursuance of this Act, or of the authority therein contained, that would impair the obligation of its contract with the Waterworks Company; nor is it claimed that the City invokes this Act as releasing it from any obligation. The acts of the City complained of are precedent to and independent of this legislation.

The original bill was filed by the appellant, The Mercantile and Deposit Company, of Baltimore, Md., as Trustee for the holders of the mortgage bonds of the Waterworks Company, against the City of Columbus, a municipal corporation of the State of Georgia, against the Mayor and Aldermen of said city in their official capacity, and against the Columbus Waterworks Company, a corporation and citizen of the State of Georgia. The right

to maintain the suit proceeds upon the theory that the conduct of the city is such as to impair the obligation of its contract with the Waterworks Company; and that the benefit of said contract having been pledged as security for the bonds, the plaintiff (appellant) as Trustee for the bond-holders may in their interest enforce the said contract and protect its obligation from impairment. It is not claimed that any contractual relation existed between the Trust Company and the City. Whatever rights the Trust Company may have as against the City are derived from and depend upon the trust mortgage executed by the Waterworks Company to secure the issue of its bonds. The City is no party to this mortgage.

The bill alleges that the contract in question conferred upon the Waterworks Company the exclusive privilege of maintaining and operating waterworks in the City during the life of the contract.

Transcript page 7, Sec. XVI.

It is not averred that in granting an exclusive privilege the City acted under even color of legislative authority.

It is averred that the ordinance of September 14th, 1902, the election held in pursuance thereof, and the

resolution inviting bids for the purchase of the bonds, amount to a repudiation of the contract by the City and a disavowal of any liability thereunder.

Transcript pages 8-9.

It is claimed that such conduct on the part of the City is an "attempt" to violate the obligation of the contract under "color" of authority of law.

Transcript page 12.

It is, nevertheless, averred that the contract "is still in force and is a valid and binding contract."

Transcript page 8.

It is also alleged that the City "unlawfully" refuses to pay an installment of water rental claimed to be due.

Transcript page 10, Sec. XXI

It does not appear when this refusal to pay occurred, or upon what ground it was sought to be justified. It

is not alleged that at the time of the filing of the bill the City was not taking and paying for water under the contract.

The bill avers that not only had the Waterworks Company done all in its power to comply with the contract, but it had in fact fulfilled and performed all of the obligations resting upon it under the contract.

Transcript page 6.

The bill, however, shows that on December 22nd, 1902, the appellant here, as Trustee for the holders of the bonds of the Waterworks Company, filed a bill in the Circuit Court for the foreclosure of the mortgage and for a receiver in aid thereof. The receiver was appointed, and under authority of the court issued $50,000 in receiver's certificates, devoting the proceeds to the improvement of the water system, in order that an adequate supply of wholesome water might be furnished.

Transcript page 10, Sec. XX.

At the time this foreclosure bill was filed there had been no default in the payment of interest on the bonds. The default alleged was the failure on the part of the

Waterworks Company to observe its convenant to so maintain its system as to enable it to provide an adequate supply of water to the City of Columbus and its inhabitants. It was in said bill averred upon information, that for more than six month preceding the Waterworks Company had suffered the security of the bondholders to become impaired by not keeping its system supplied with all of the machinery, equipment and appliances for providing water to the City of Columbus and vicinity, and by not making useful and proper additions, betterments and improvements to its waterworks.

Transcript page 66.

It is indicated that the default on the part of the Waterworks Company was directly caused by a failure in its source of water supply; and it is stated that owing to the attitude of the City of Columbus in taking steps to provide a water system of its own, the Waterworks Company could not sell its bonds to raise money and was therefore unable to provide an adequate source of supply.

Transcript page 66.

To the original bill the City demurred on the grounds, among others, as follows:

That the City was without power to grant an exclusive privilege;

That the requisite diversity of citizenship did not exist to confer jurisdiction on the Circuit Court, after an alignment of the parties according to interest;

That no federal question was presented.

Transcript pages 53, 54, 77-78.

On October 19th, 1903, the plaintiff (appellant) filed an amended bill praying an order of the Court authorizing the issuance of receivers' certificates in an amount which would, in the opinion of the Court, be adequate to furnish the City and its citizens with a sufficient supply of wholesome water, in accordance with the terms and requirements of the contract in question. The belief was expressed that any failure on the part of the Waterworks Company to comply with the requirements of the contract was due in large part if not entirely to the conduct of the City of Columbus.

Transcript pages 56, 57.

The demurrer of the City was renewed to the bill as amended.

Transcript pages 57, 58.

After hearing argument of counsel, the Court overruled these demurrers.

Transcript page 65.

The cause was in due course referred to the master, who took evidence, heard argument, and filed his report. While the cause was pending in the Circuit Court on exceptions to the Master's report, and after argument thereon, counsel for the City of Columbus filed a motion to dismiss the bill as amended for want of jurisdiction on the following grounds:

First. Because there is no such diversity of citizenship as is requisite to sustain the jurisdiction of the court, for that the Columbus Waterworks Company while nominally a defendant should be aligned with the plaintiff according to interest, and the said Waterworks Company is a corporation and citizen of the same State as this defendant.

Second. Because there is no federal question involved on which the jurisdiction of the court can be sustained independently of diversity of citizenship, for that the action of the city in proceeding to issue bonds for the construction of its own system of waterworks constituted at most a breach of the contract not equivalent to legislation affecting or impairing the obligation of the

contract between the city and the Columbus Waterworks Company as assignee of Thomas R. White, in contravention of the Constitution and laws of the United States.

Transcript page 78.

After argument of counsel thereon, the motion to dismiss was sustained.

Transcript page 72.

The cause is before this court on the question of jurisdiction only, upon the certificte of the presiding judge, in conformity with Section 5 of the Act of March 3rd, 1891.

ARGUMENT.

NO DIVERSITY OF CITIZENSHIP.

The diversity of citizenship requisite to confer jurisdiction does not exist.

The appellant predicates its right to maintain this suit upon its relation as Trustee for the bondholders of the mortgage bonds of the Waterworks Company. No direct contractual relation with the City is claimed. Whatever rights the appellant may have as against the City are derived from and come through the Waterworks Company. There is no controversy between them respecting the duties and obligations arising under the contract forming the subject of the suit. It is admitted that the Waterworks Company is an indispensable party, but no substantial relief is prayed against it, nor could any such relief be granted in view of the allegation that the Waterworks Company had done all in its power to preserve and carry out its contract with the City. It is obvious that when aligned acording to interest the Waterworks Company stands on the side of the appellant. There is apparent a friendly arrange-

ment devised for the purpose of conferring jurisdiction upon the United States Court.

The Waterworks Company, being a corporation and citizen of the same state as the City of Columbus and the other defendants named, the jurisdictional diversity of citizenship is lacking.

Upon this point the recent case of Dawson v. Columbia Avenue Trust Co., 197 U. S. 178, 49 L. Ed. 713, is deemed to be conclusive.

American Waterworks & Guarantee Co. v. Home Waterworks Co., 115 Fed. 171. (C. C. A.)

New York Guarantee & Indemnity Co. v. Memphis Water Co., 107 U. S. 205, 27 L. Ed. 484.

Eau Claire v. Payson, 107 Fed. 552; 109 Fed. 676. (C. C. A.)

NO FEDERAL QUESTION.

I.

The bill alleges a valid, subsisting contract on the part of the City granting to the Waterworks Company the exclusive privilege of maintaining and operating waterworks in said City for a period of thirty years from October 7th, 1881; and binding the City during that time

to rent and pay for fire hydrants as specified in the contract.

Transcript page 7.

It is alleged that the City on September 14th, 1902, adopted an ordinance ordering an election to be held on December 4th following, to determine whether the City should issue $250,000.00 of bonds, the proceeds to be applied in the construction of a municipal system of waterworks. It is further alleged that the result of said election was declared to be in favor of the issuance of the bonds, and that on May 6th, 1903, the Mayor and City Council directed that bids for the purchase of the bonds be invited.

From these facts the conclusion is drawn that the City repudiated its contract and disavowed its liability thereunder.

Transcript pages 8-9.

This conclusion is unwarranted. In none of the ordinances is the contract in question mentioned. There is not one fact averred upon which to found the allegation that the City had repudiated its contract. Only once is the Columbus Waterworks Company referred to.

and that is in the preamble to the ordinance of September 14th, 1902, ordering the bond election, wherein the following language occurs:

"WHEREAS, The Columbus Waterworks Company has totally failed to supply the City of Columbus and its inhabitants with a sufficient quantity of pure and wholesome water; and WHEREAS, the public health of the City of Columbus is paramount in importance to every other consideration," etc.

Transcript page 46.

There is no allegation that at the time the bill was filed the City was not taking and paying for water as provided in the contract. The logical inference is that the City had determined it to be necessary to construct and operate its own system because the Waterworks Company had totally failed to perform its contract obligation to furnish an adequate supply of wholesome water. This is supported—indeed rendered certain—by the averments contained in the bill filed on December 23rd, 1902, by the appellant as Trustee for the bondholders against the Waterworks Company for foreclosure of the trust mortgage. There was no default in the payment of interest on the bonds at that time, and the bill proceeded upon the theory that the Water Company

having failed to observe the requirements of its contract with the City the security of the bondholders was endangered. In that bill it is alleged upon information "that for more than six months past the Columbus Waterworks Company has suffered the security of the bondholders to become impaired by not maintaining and keeping its waterworks supplied with all the machinery, equipment and appliances for providing water for the City of Columbus and vicinity, and by not making useful and proper additions, betterments and improvements to said waterworks."

Transcript page 66.

No denial of this averment appears in the record and it must be taken to be true. It is fair to conclude then that the City had not disclaimed any of its obligations under the contract, but was in good faith proceeding in discharge of its municipal trust to remedy the default of the Water Company by supplying the quantity and quality of water necessary to preserve the health and protect the property of its inhabitants. If this contention tect the property of its inhabitants. If this contention was well founded it was both the right and duty of the City to follow the course adopted. If the City was bound under its contract not to erect a rival system under the conditions as they existed, its action would simply be a breach of the contract for which the local law afforded ample redress.

It is plain that the dispute was whether the Waterworks Company had so failed in the discharge of its duty under the contract as to justify the City in proceeding to construct a municipal system. This controversy presents no semblance of a federal question. The construction of the contract, as well as the rights and duties of the parties arising thereunder, depend wholly upon the law of the State of Georgia. If the City was right in its contention its action would be justifiable; if wrong, it would be legally liable for its violation of its contract.

II.

Should the acts of the City be construed to be the equivalent of a repudiation of the contract, this would not give rise to any federal question.

A denial of liability under a contract does not affect its obligation. The inherent difference between a contract and its obligation has been repeatedly recognized by this Court, which has declared that the word "obligation" occurring in the contract clause of the Constitution was used advisedly. Parties make contracts; the law creates the obligation.

Mr. Chief Justice Marshall thus pointed out the dis-

tinction in Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529:

> "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this, of course, is the obligation of his contract."

The obligation of the contract is the "chain of the law" giving legal efficacy to the undertaking.

Ogden v. Saunders, 12 Wheat. 213, 9 L. Ed. 642.

Since the law creates the obligation, only the law can impair or destroy it. It can not be affected by any act or default of either contracting party. The Constitutional provision is intended to protect the obligation of contracts against impairment by the laws of a state. The subsequent law must have the effect of loosening the chain of the obligation by changing the rights or the essential remedies of the parties as they existed when the contract was entered into.

Ogden v. Saunders, 12 Wheat. 214, 327; 9 L. Ed, 642.
Bronson v. Kinzie, 1 How. 312; 11 L. Ed. 143.
McCracken v. Haywood, 2 How. 608; 11 L. Ed.397.
Edwards v. Kearzey, 96 U. S. 595; 24 L. Ed. 793.

A municipal ordinance, if authorized by the legislature, may have the force and effect of a law of the state; and if obnoxious to the Constitution, be held to impair the obligation of a contract. The ordinance must have been passed in pursuance of state legislation passed subsequent to the contract.

McCracken v. Haywood, 2 How. 608; 11 L. Ed. 397.

Lehigh Water Co. v. Easton, 121 U. S. 392; 30 L. Ed. 1059.

The mere fact, however, that a party repudiating a contract is a municipal corporation, does not give to its refusal to perform the character of a law impairing the obligation of the contract, or constitute the taking of private property without due process of law.

Dawson v. Columbia Ave. Trust Co., 197 U. S. 178; 49 L. Ed. 713.

St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142; 45 L. Ed. 788.

Hamilton Gas Co. v. Hamilton, 146 U. S. 258; 36 L. Ed. 1059.

In pursuing the course adopted, the City of Columbus acted without legislative sanction. No law of the State

had been passed subsequent to the contract which in the slightest degree altered the rights or remedies of either party. If the City was, under the contract when made, bound not to construct a rival system of waterworks, it was still so bound unless relieved by the default of the Waterworks Company. If no such obligation existed, or if the City was without power to so contract, the conduct of the City offended no principle of law or morals. The right of the City to provide its own water supply was the same as when the contract was entered into unless the City was lawfully restrained by the contract itself.

The City contracted (1) that "The Mayor and Council are to grant a franchise for the exclusive privilege of maintaining and operating the works for a period of thirty (30) years, or until such time as they may be purchased by the City;" and (2) that during such time it would rent and pay for a specified number of fire hydrants.

Transcript page 36, Sec. XIV.

Whether the contract granted an exclusive privilege such as to prevent the City from constructing its own system, and if so whether the City had power to grant such an exclusive right, are questions to be determined by the laws of the State, in no wise involving the con-

struction or application of the Constitution of the United States.

Fergus Falls v. Fergus Falls Water Co., 72 Fed. 873.

If the City in fact granted such exclusive privilege and if in law it had power so to do, none of the alleged acts on the part of the City have in the least impaired the obligation of the contract. All of the rights and remedies of the Waterworks Company existing when the contract was made remain undisturbed and legally enforceable.

The refusal of the City to pay an installment of water rental claimed to be due is alleged to have been "unlawful," (Trans. p. 10) and is so plainly a mere breach of the contract as not to require argument.

Ratton Water Co. v. Ratton, 174 U. S. 360; 43 L. Ed. 1005.

St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142; 45 L. Ed. 788.

In the case of Dawson v. Columbia Avenue Trust Co., 197 U. S. 178; 49 L. Ed. 713, the City of Dawson entered

into a contract by its terms granting an exclusive franchise, in pursuance of the same general authority of law as did the City of Columbus in the present case. In Georgia, a city in the exercise of its police power and in order to promote the general welfare may contract for or itself provide a supply of water for domestic use and fire protection.

Frederick v. Augusta, 5 Ga. 561.
Rome v. Cabott, 28 Ga. 50
Wells v. Atlanta, 43 Ga. 67.
Dawson v. Dawson Waterworks Co., 106 Ga. 709.

The City of Dawson formally and specifically repudiated its contract on the ground that the City was without power to grant an exclusive franchise, and on the ground that the contract for payment of future rentals created an indebtedness prohibited by the Constitution of the State. The City thereafter refused to pay even for water used for fire protection. As in the instant case, a popular election was ordered and held to determine whether bonds should be issued to provide a municipal water system. The result was declared to be in favor of bonds, and the City was proceeding to issue and market the bonds for this purpose.

The Court declared that the repudiation of a contract by a municipal corporation without legislative authori-

ty did not amount to the violation of the obligation of a contract, and continued:

"We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts or otherwise to give rise to a suit under the Constitution of the United States."

The case at bar can not be distinguished from the Dawson case, unless the Act of December 3rd, 1902, creates a substantial difference.

III.

The Act of the General Assembly of Georgia approved December 3rd, 1902, was not intended to nor did it affect the contract between the City and the Waterworks Company.

This Act gave no authority to the City to avoid any of its contracual obligations. It did not even create the right to build a municipal system of waterworks. As has been shown that right was already vested in the City. This Act merely defined the right and conferred other incidental powers designed to aid in the more perfect accomplishment of the end in view. There is noth-

ing in the Act which would authorize the City to do anything in derogation of its contract with the Waterworks Company. Neither the Waterworks Company nor its contract with the City was mentioned or even remotely referred to. The Act would not be employed to coerce or induce the Waterworks Company to part with its property or any of its rights. It simply authorized the City to adopt certain methods and employ certain machinery for the more complete exercise of an undoubted power. The rights, remedies, duties and obligations of neither party to the contract were in the slightest degree varied. Not one single act on the part of the City is pointed out as having been taken in pursuance of or under color of authority of this state legislation. It is not claimed, nor could it be, that the City vouches this law as a justification for any of the acts which are alleged to be in derogation of the contract.

The acts of the City which are alleged to constitute an "attempt" to violate the obligation of the contract are stated to be:

1. The ordinance of September 14th, 1902, declaring the default of the Waterworks Company and submitting to the qualified voters of the City the question whether bonds should be issued for the purpose of constructing a municipal waterworks system.

2. The declaring of the result of the election as being in favor of the issuance of the bonds.

3. The resolution of May 6th, 1903, inviting bids for the purchase of the bonds.

The ordinance submitting the question of the issuance of bonds to the qualified voters of the City and ordering an election thereon was adopted nearly three months before the Act of the Legislature was passed. The ordinance was enacted by the City in the exercise of its police power, subject to which the contract was entered into, and was predicated upon the default of the Waterworks Company. The election held was pursuant to this ordinance, deriving neither authority nor validity from the Act of the Legislature. The resolution inviting bids for the purchase of the bonds was subordinate to and strictly in pursuance of the preceding ordinance and election. These subsequent acts depended wholly upon the ordinance of September 14th, 1902, and are entirely independent of the Act of the Legislature mentioned.

If the City was not justified in these several related acts by conditions existing on September 14th, 1902, nothing in the Act of December 3rd, 1902, can vitalize or sanction them.

This Act can not be construed as a ratification by the State of any previous action on the part of the City which would otherwise be illegal. As has been shown the City already possessed the power to build waterworks. Its right to issue bonds for this purpose was not

derived from the Act, but was founded upon laws in existence when the contract was made. If it was forbidden by its contract from taking the action the City could claim no immunity by anything contained in this Act of the Legislature. It was only authorized to proceed lawfully in the execution of its purpose, not in contravention of law by a disregard of any valid contract obligation.

The case at bar is clearly distinguishable from the actAl under subsequent legislation manifestly directed acted under subsequent legislation manifestly directed against the contract in the particular case.

In the Vicksburg case (185 U. S. 65; 46 L. Ed. 808) the contract was entered into under legislative authority and its repudiation was expressly sanctioned by a subsequent act putting an arbitrary valuation upon the property of the Water Company.

In the Knoxville case (No. 123, decided January 2, 1906) the City acted in direct pursuance of legislation authorizing it to purchase the property of the Water Works and in default thereof to construct a rival system.

IV.

The Court will look beyond the allegations of the bill to the facts properly pleaded in order to determine whether a real and substantial federal question is presented.

Millingar v. Hartupee, 6 Wall. 258, 18 L. Ed. 829.

Wilson v. North Carolina, 169 U. S. 586, 595, 18 Sup. Crt. 435, 42 L. Ed. 865.

McCain v. Des Moines, 174 U. S. 168, 181, 19 Sup. Crt. 644, 43 L. Ed. 936.

New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 344, 22 Sup. Crt. 691, 46 L. Ed. 936.
Sawyer v. Piper, 189 U. S. 154, 23 Sup. Crt. 633, 47 L. Ed. 757.
Newburyport Waterworks Co. v. Newburyport, 193 U. S. 561, 576; 24 Sup. Crt. 553; 48 L. Ed. 795.
Harris v. Rosenberger, 145 Fed. 449. (C. C. A.)

In the Newburyport case (supra) it was said:

"If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial but is without color of merit."

In the case at bar the Court will look to the facts properly pleaded and also to the contract attached as an exhibit to the original bill to see if any valid grant of an exclusive privilege has been made. As was said by Judge Caldwell in Fergus v. Fergus Falls Water Co., 72 Fed. 876: "If there was no contract there was no obligation to be impaired. If there was a valid contract its obligation is not questioned."

It is not open to question in this Court that in the absence of express legislative authority a municipal corporation can not grant an irrevocable, exclusive privilege so as to create a monopoly.

Mr. Justice Nelson in Minturn v. La Rue, 23 How. 453, 16 L. Ed. 574, states the principle as follows:

"It is a well setttled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities."

In Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921, it is held that exclusive rights to franchises are not favored and will never be presumed. In that case it appeared that the statutes of Georgia authorized the inferior courts to confer franchises for the establishment of ferries and bridges, but the court said that such a power did not confer the right to tie the hands of the public with respect to its future necessities.

The Court, speaking by Mr. Justice Waite, said:

"Every statute which takes away from the Legislature its power will always be construed most strongly in favor of the State. These are elementary principles. The question here is whether the legislature of Georgia conferred on the inferior courts of its several counties the power of contracting away the right of the State to es-

tablish such ferries and bridges in a particular locality as the ever-changing wants of the public should in the progress of time require. In our opinion it did not. It gave these courts the right to establish ferries or bridges, but not to tie the hands of the public in respect to its future necessities."

In Detroit, etc., Street Railway Co. v. Detroit, etc., Co., 171 U. S. 48, 43 L. Ed. 67, the Street Railway Company was by the city ordinance "exclusively authorized to construct and operate railways on certain streets of the City for a period of thirty years." The Act of the legislature under which the Street Railway Company was organized provided that all such companies "shall have the exclusive right to use and operate any railways constructed, owned or held by them." The City granted a franchise to another railway company. In considering the case the Court said:

"It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive franchise to occupy its streets for railway purposes." * * * * "That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and

bound by the conditions of the present time and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

The Court declares the principle underlying its decision as follows:

"A municipality is a governmental agency—its functions are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs.

"Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

For other cases expressing the same doctrine, see Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271.

Jackson Co. R. Co. v. Interstate, etc. Co., 24 Fed. 306.

Saginaw Gas Co. v. Saginaw, 28 Fed. 529.

Grand Rapids, etc., Co. v. Grand Rapids, 33 Fed. 659.

In re Brooklyn, 143 N. Y. 596.

Long Island Water Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165.

It is equally well settled that in grants of exclusive franchises by municipal corporations nothing passes by implication. The grant is to be construed more strongly in favor of the public and against the grantee.

In Knoxville Water Co. v. Knoxville, No. 123, decided by this Court January 2nd, 1906, the Court discusses former cases and declares it to be clearly settled that in cases of such grants nothing passes by implication or presumption.

In Joplin v. Southwest Missouri Light Co., 191 U. S. 150, 48 L. Ed. 127, it appeared that the City was authorized to construct and operate electric light plants or waterworks of its own, or it might grant such right to any person or corporation upon such terms as might be prescribed by the ordinance. The City of Joplin granted this right to a private corporation. Subsequently the City provided for the construction of its own system. The Circuit Court held that the City could not thus enter into competition with its grantee and so to destroy or greatly impair the value of the franchise. This court reversed the Court below saying that the limitation con-

tended for was upon a governmental agency and that restraints upon that must not be readily implied, and that such a limitation would give the light company a practical monopoly for that "others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality while the appellee exercises and enjoys practically exclusive right."

Not only was the City of Columbus without any color of authority for granting an exclusive franchise which would tie the hands of the city in the future with respect to the interests of the public, but the legislature itself was forbidden to make such a grant.

The Constitution of Georgia, Article I, Section 2, Paragraph 2, Code Sec. 5730, declares as follows:

> "No bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts or making irrevocable grants of special privileges or immunities shall be passed."

The Constitution of Alabama uses identically the same language with respect to such grants. Section 1 of Article 23 of that Constitution is as follows:

> "That no ex post facto law, or any law impairing the obligations of contracts or making any irrevocable grants of special privileges or immunities shall be passed by the General Assembly."

This section of that Constitution has been construed and applied by the Supreme Court of Alabama in the case of Birmingham & P. Min. Ry. Co. v. Birmingham Street Railway Co., 79 Ala. 465, 58 Amer. Rep. 615. The City of Birmingham had given what was in general terms an exclusive right to the plaintiff to construct a street railway along certain streets, and afterwards had given to the defendant the right to occupy the same streets with the street railway. Considering the first grant by the City the Court said:

> "What, it may be asked, is the nature of these special or exclusive privileges, which are thus prohibited to be granted by the legislature? It seems plain from the very terms used that the evil intended to be specially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises. Monopolies were void at the common law, and are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic. . . . The policy of the law, as now declared by our Constitution, is as clear in the condemnation of the grant of irrevocable exclusive privileges conferred by franchise, as that of the common law was in the reprobation of pure monopolies which were always deemed odious, not only as being in contravention of common right, but as founded in the destruction of trade by the extinguishment of a free and healthy competition. Case of the Monopolies, 11 Coke, 84b. The exclusive

> right of the appellee to the privilege claimed, in our opinion, can not be sustained. The General Assembly would itself have no power under the Constitution to make such a grant."

This case was quoted from and cited with approval by this Court in Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 46 L. Ed. 1132.

The City did not expressly contract that it would not build waterworks of its own as in the Walla Walla case. The language of the contract in question is "that the Mayor and Council are to grant the franchise for an exclusive privilege," etc. Unless the privilege is exclusive the City can not be said to have contracted not to invade that privilege; if it is exclusive it is forbidden by the Constitution and laws of the State of Georgia.

Had the City been vested with authority from the legislature to grant an exclusive privilege and had it in fact done so it would have been subject to the reserved right of revocation.

The case of Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 46 L. Ed. 1132, is closely in point, if not indeed conclusive of the proposition.

The charter of the Water Company gave it the exclusive right of supplying water to the City and County of

Mobile for a term of twenty years, and until the purchase of the plant by the City, reserving, however, the right to permit the future organization of any company for the purpose of supplying the City with water which should not interfere with the property rights of the Bienville Company. The City contracted with the Bienville Company for water for a term which had not expired. Afterwards, but before the expiration of the contract term, the Legislature conferred upon the City the right to erect its own water system; and amended the charter of the Bienville Company by striking therefrom the word "exclusive," thus depriving the grant of its exclusive character. The City was proceeding to erect its own system, when the Water Company sought to enjoin it. The Court after stating that obviously the Alabama Constitution intended that the Legislature should have the right of revocation, and that whoever took a charter should take it subject to that right, declared that the exercise of the right was not limited to cases where no injustice would thereby be done to the corporators. Speaking by Mr. Justice Brewer, the Court said:

> "But the grant of a monopoly is forbidden by the Alabama Constitution. As said by its Supreme Court, in the quotation just made: 'The General Assembly would itself have no power under the Constitution to make such a grant.'
>
> "By a separate section of the Constitution it is affirmatively declared that the Legislature shall pass no act "making an irrevocable grant of special

privileges or immunities." While that body may grant special privileges and immunities, grant franchises to build waterworks, construct railways, or other works of public utility, and by failure to duplicate a grant make it in effect for the time being exclusive, yet no one Legislature can forestall action by a succeeding Legislature, or bind the State by making the grant in terms exclusive. As much force and effect must be given to Section 23 as to any other, and it was obviously the intent that, even if exclusive privileges were granted, the monopoly feature thereof should always be subject to revocation. In this section there is no suggestion of amendment or alteration. That which is distinctly provided is the absolute power of revocation. To hold that the exclusive feature of plaintiff's grant could not be revoked because thereby injustice might be done to the corporators is simply to nullify Section 23."

The right of the State to revoke grants to corporations is expressly recognized by the Supreme Court of Georgia in Macon & Birmingham R. Co. v. Gibson, 85 Ga. 1; and in response to the contention that the rights of third parties would be affected the Court said that all parties contracting with a corporation must take notice of the conditions on which it holds its franchise and of its subjection to the legislative will.

A very similar constitutional provision of the State of Ohio has been passed upon by this Court in the case of Hamilton Gaslight & Coke Co. v. City of Hamilton, 146 U. S. 258, 36 L. Ed. 963.

A statute of the State of Ohio gave to cities the right to contract with gas companies for city lighting. The City of Hamilton, by ordinance, gave the gas company "the exclusive privilege of laying pipes for carrying gas in said city and of putting up pipes in dwellings in connection with the street pipes for the term of twenty years." Subsequently the City passed a resolution declaring that it no longer desired the company to furnish gas for public lighting, and notifying the company to remove its mains and posts from the streets. The City passed an ordinance looking to the issuing—such issuing being first approved by the popular vote—of bonds for the purpose of itself erecting works to supply the City and its inhabitants with gas. It also appeared that the City was authorized by the Legislature to erect works of its own. Suit was thereupon instituted by the gas company against the City to enjoin it from issuing bonds and from erecting gas works of its own.

The Court said:

> "It may be that the stockholders of the plaintiff supposed at the time it became incorporated, and when they made their original investment, that the City would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the City at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purpose for which they were established. But such

> consideration can not control the determination of the legal rights of the parties. As said by this Court in Curtis v. Whitney, 13 Wall. 68, 70: 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which the parties look now in making a large class of contracts, that they may be affected in many ways by State and national legislation.' If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public."

The Constitution of Ohio contains a clause, similar to that in force in this State, which provided that "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly."

Discussing the effect of this clause on a franchise, exclusive by its terms, the Court said:

> "If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of the law, of supplying gaslight to the City of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the

conclusion that such a grant as respects, at least, its exclusive character, was subject to the power of the Legislature, reserved by the State Constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges, necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract, but where one of the conditions of the grant is that the Legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, can not be regarded as one impairing the obligation of the contract, whatever may be the motive of the Legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it."

There is nothing in the case of Walla Walla v. Walla Walla Water Company, 172 U. S. 1, 43 L. Ed. 341, that conflicts with or qualifies the proposition that the City can not, in the absence of express authority, grant an exclusive privilege or franchise. In the opinion it is said that a grant of a right to a water company to use the streets of the city is a franchise granted on consideration of a public service, and after performance by the grantee is a contract protected by the Constitution of the United State *"provided the right to do so is given by their charter."* The City of Walla Walla was expressly authorized to grant the franchise for the term

In the Walla Walla case no constitutional provision was involved nor had the Courts of the State construed the clause in the charter of the City relating to the incurring of indebtedness. The contrary is true of the case at bar and brings it within the general rule that this Court will accept as binding the construction given by the highest Court of the State to its own Constitution and Statutes.

V.

It plainly appears from the facts of the case at bar that in providing for the construction of a municipal water system the City was proceeding in the exercise of its police power. Against the exercise of this power the City could not bind itself by contract.

This Court says in Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341, 347:

> "If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it can not bind itself to any course of action which may prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the Constitution is ineffectual."

Mr. Justice Bradley, speaking for the Court in Boston

Beer Co. v. Massachusetts, 97 U. S. 28, 24 L. Ed. 989, says:

> "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals. The Legislature can not, by any contract, devest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim "salus populi suprema lex," and they are to be attained and provided for by such appropriate means as the Legislature legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In Butchers Union Co. v. Crescent City Co., 111 U. S. 746, 28 L. Ed. 585, the Legislature of Louisiana had granted the Crescent City Company an exclusive right to slaughter cattle in the City of New Orleans; that this right was exclusive had been determined in the Slaughter House cases, 16 Wall. 86, 21 L. Ed. 394, and it was further held that the State had the constitutional right to grant the exclusive franchise creating the monopoly.

In the Butchers Union case it was said that the Crescent City Company had expended a very large amount of money on the faith of the privilege and that the transaction presented all the elements of a contract on suffi-

cient consideration; and it further said that an ordinance of the City of New Orleans granting the right to slaughter cattle to others impaired the supposed obligation of the contract by taking away the exclusive right of the company granted to it for twenty-five years, which constituted the most valuable thing supposed to be secured by statutory contract. The Court held that the ordinance was a proper exercise of that well-known but undefined power called the police power so indispensable to the public welfare that it can not be bargained away by contract.

The Court, speaking through Mr. Justice Miller, forcibly declares:

> "While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to the subject so embraced, it can not by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to devest itself of the power to enact laws for the preservation of health and the repression of crime."

Upon this branch of the case we submit that even if it should be considered for the sake of argument that

the Act of the General Assembly of Georgia authorized the City of Columbus to proceed in derogation of an exclusive privilege granted in the contract with the Waterworks Company, it is so plainly apparent that the City was without power to make such a contract that no federal question can be said to be involved; and further that even if the City had the power to grant an exclusive franchise the reserved right of the State was sufficient to authorize its revocation whenever in the opinion of the City the public interest so required.

ELLIS, WIMBISH & ELLIS,
J. H. MARTIN,
T. T. MILLER,
Solicitors for Appellees.

W. A. WIMBISH,
J. H. MARTIN,
of Counsel.
October 22, 1906.

Supreme Court of the United States.

No. 50.—October Term, 1906.

The Mercantile Trust & Deposit Company of Baltimore, Appellant, *vs.* The City of Columbus, L. H. Chappell, Mayor, et al.	Appeal from the Circuit Court of the United States for the Northern District of Georgia.

[December 3, 1906.]

The appellant filed its bill in this case in the United States Circuit Court for the Northern District of Georgia to obtain an injunction restraining the City of Columbus, in the State of Georgia (one of above defendants) from the construction of waterworks for the supplying of water to the defendant city and its inhabitants. Judgment was entered by the Circuit Court dismissing the bill for the want of jurisdiction, and the question of jurisdiction alone was certified to this court under section 5, chapter 517, of the Acts of Congress of 1891.

The complainant based the jurisdiction of the Circuit Court on the ground of diverse citizenship, and also upon the existence of a Federal question. An amended bill was filed and a motion made for an injunction *pendente lite*, enjoining the city from issuing bonds or doing any work towards the construction of the waterworks. The motion was granted, and a demurrer to the amended bill having been overruled, and issue having been joined by the service of an answer and replication, the case was referred to a master. Evidence was taken before him, and a report thereafter filed, to which exceptions were duly taken by both parties and an argument had thereon before the court. The judge certifies that before a decision had been made by the court on the questions of law raised by the exceptions the defendant filed a motion to dismiss the bill on the ground that if the parties to the suit were properly placed, there was no such diversity of citizenship as was required to sustain the jurisdiction of the court, and also on the ground that there was no Federal question involved. The court granted the motion on those grounds and made its certificate, as stated.

The suit was brought by the appellant, a citizen of Maryland, against the city of Columbus, a municipal corporation created by the State of Georgia, and its mayor and aldermen, all of them citizens of the State of Georgia, and against the Columbus Waterworks Company, a corporation also created by the State of Georgia.

It appears from the averments contained in the bill that the complainant is trustee for the bondholders in a certain mortgage executed by the waterworks company, in January, 1891, to complainant, as trustee, to secure the payment of certain bonds, and to raise money for the purpose of making improvements and additions to the waterworks which were to supply the city of Columbus with water, and for providing for future extensions and improvements thereof. The mortgage is upon all of the company's property, and also upon all contracts made, or thereafter to be made, between the waterworks company and the city of Columbus for the supplying of water by the company to the city, or any public institution or public office. The mortgage also included all the water rents, etc., and all the income whatsoever of the mortgagor, due or to grow due, arising from its business of supplying water within the city, or within its vicinity or elsewhere, during the continuance of the lien under the mortgage.

It also included therein a contract, which had been entered into in October, 1881, between one Thomas R. White, of the city of Philadelphia, and the mayor and council of the city of Columbus, (defendant herein,) for the construction and operation of an effective system of waterworks for the supplying of the city with water for the various uses required. This is the contract in question in this suit. Provision for a corporation was made in the contract to which it was to be assigned; the corporation was subsequently created, and such contract was assigned by White to the water company, and the assignment was assented to by the city. The contract provided in great detail for the erection of a water system for the city and for private consumers, and it contained all the usual provisions for that kind of a contract.

It was, among other things, provided in the contract that the city should grant a franchise to the other party named therein, for the exclusive privilege of maintaining and operating the waterworks for a period of thirty years, or until they might be purchased by the city, as provided in the contract.

The work under the contract was completed and accepted by the city November 6, 1882, and the company then commenced to and did for some years furnish water, under its provisions, to the city and its inhabitants.

Thereafter disputes and differences arose between the parties, regarding the sufficient supply of water for the city and its inhabitants, the city contending that the water company had entirely failed to satisfactorily fulfill the contract in that respect. The company contended, on the other hand, that it had done all that possibly could be done, under the circumstances of an extraordinary and unprecedented drought, and was willing to spend more money for the purpose of enlarging its field of supply, if

the city would not by its proposed action defeat such purpose. The differences continued, until finally, on the 14th day of September, 1902, the city passed an ordinance for submitting to the voters of the city the question of issuing $250,000 of bonds of the city, to be used for the purpose of building and operating and owning, a system of waterworks by the city. A special election was called for the 4th day of December, 1902. The ordinance opened with the statement that the water company had totally failed to supply the city of Columbus and its inhabitants with a sufficient quantity of pure and wholesome water, and that the public health of the city was of paramount importance to every other consideration, and the city, therefore, proposed an ordinance (which it set forth for the approval of the electors) for the issuing of bonds for the building of a separate system of works to be owned and operated by the city. It was provided in the proposed ordinance that if the electors assented to the issue and sale of the bonds to be used for the purpose of building and operating the waterworks, that thereafter bonds of the city should be issued upon certain conditions, and an annual tax should be levied for the payment of the interest on the bonds and a certain proportion of the principal every year. The proposed ordinance also provided that in the event of the assent of the voters at the election, and the issuing of the bonds when the same should have been validated, as by law required, thereafter the waterworks were to be considered a separate and distinct department of the city government, and a water commission was to be created for the government and control and operation of the waterworks. Other provisions were contained in the proposed ordinance regulating the doing of the work and the operation of the constructed work.

On the 3d day of December, 1902, (the day before the election under the city ordinance,) the legislature, at the request, as it may be presumed, of the city, passed an act to amend its charter, so as to confer power and authority upon the city to construct, maintain and operate a system of waterworks of its own. The act gave power to the city to appropriate private property, and to lay its pipes through its streets, either within or without the corporate limits of the city, and the city was given power and authority generally to do and perform all things necessary to carry the object and purposes of the act into effect. Section 7 of the act expressly conferred upon the city the right to issue and sell its bonds, for the purposes of building and operating the waterworks. Provision was also made in the act for the appointment of a board of water commissioners, who should have the supervision and control of the construction, operation and management of the waterworks. This board was to regulate the distribution and use of water in all places, it was to fix the price for the use thereof, and terms of payment therefor. The moneys coming into the

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hands of the board for water rents and the sale of any apparatus, or other property, or from any other source connected with the waterworks, were to be paid to the treasurer of the city, and were to be used by him only for the purpose of paying any principal and interest becoming due on the bonds issued by the city. The board was to be regarded as a subordinate branch of the city government.

The ordinance above mentioned and this act of the legislature of Georgia having been passed subsequently to the execution of the contract, are asserted by the complainant to be acts which impair the obligation of such contract.

Proceedings were taken under the ordinance, and the election was held pursuant to its provisions on the 4th of December, 1902, and resulted in the assent of the requisite number of electors to the issuing of the bonds and the use of the proceeds in the erection of a water system, to be owned and controlled by the city.

A board of water commissioners was thereupon appointed, under the provisions of the ordinance and the act of the legislature, and on the 6th of May, 1903, the common council received a communication from the board, through its secretary, wherein the board requested the common council to invite bids for the bonds of the city for the purpose of constructing the system of waterworks, which bids were to be opened on the 1st of August, 1903. Thereupon the common council on the same day complied with the request, and directed the publication of a notice for receiving bids for the bonds up to August 1, 1903.

On the 30th of July, 1903, the complainant filed this bill against the parties named. It is contended in the bill that, as trustee for the bondholders, the complainant can maintain this action, on the ground of an impairment of the obligation of the contract already mentioned, and that as the water company has mortgaged to the complainant the benefits of its contract with the city, together with the other property of the water company, as security for the payment of its bonds, any such action as proposed by the city will destroy the value of the bonds of the water company and will amount to the taking of complainant trustee's property without due process of law, and will deprive it of the equal protection of the laws. The water company is made a defendant for the purpose of binding it, as averred in the bill, by the judgment and decree that may be rendered in this cause, so that the right and equity of subrogation, or other rights and equities set up, may be enforced and decreed against the water company, and that the water company may be held and decreed, on its part, to specifically perform all the obligations of such contract. An injunction was asked for and granted, as stated, *pendente lite*. It was also asked that the defendant city might be enjoined from refusing to

carry out the contract with the waterworks company, and from placing any obstacle in the way of the due performance thereof, according to its terms.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The sole question arising herein is whether the Federal Circuit Court had the jurisdiction to determine the issue involved. That question alone has been certified to this court by the Circuit Court, under the provisions of the fifth section of the act of Congress of 1891. The grounds of the dismissal of the bill are set forth in the foregoing statement of facts.

Whether this case comes within the principle laid down by this court in *City of Dawson* v. *Columbia Avenue Saving Fund &c. Co.*, (197 U. S. 178,) upon the question of diversity of citizenship, it is unnecessary to determine, because there is, in our opinion, a Federal question involved, which gave the Circuit Court jurisdiction to determine the case without reference to citizenship. It is averred in the bill that by reason of the passage of the ordinance of the common council of the city and the act of the legislature of Georgia, passed December 3, 1902, the obligation of the contract set forth in the bill was impaired. It is part of the duty of the Federal courts, under the impairment of the obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the State legislature, which impairs its obligation. That the ordinance of the common council of a municipal corporation may constitute a law within the meaning of this constitutional clause is too well settled to admit of doubt. (*St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Davis &c. Co.* v. *Los Angeles*, 189 Id. 207–216.) The contract in this case provided in terms for the exclusive privilege of supplying water to the city and its inhabitants for thirty years from the date of its completion. By the ordinance of the city of 1902 the city insisted that the water company had totally failed to fulfill its contract to supply water to the city and its inhabitants. Such ordinance then went on and proposed to the electors an ordinance, the material portions of which have been set forth in the foregoing statement.

The act of the legislature, passed the day before the day of the election, is also referred to in the statement, and some of its material provisions are mentioned.

The ordinance and the act should properly be considered together, and they evidently contemplate an immediate execution of the work in case the electors assented to the issuing of the bonds. If the provisions of the ordinance and act were carried out, the effect, of course, could be none other than disastrous to the water company, as the obligations of the contract (if any) would thereby be so far impaired as to render the contract

involved in that case. The Court further said that it was immaterial in so far as concerned the jurisdiction predicated upon a federal question whether the city contracted in its sovereign or proprietary capacity "*provided the right to make such contract was conferred by the charter.*"

The Court continues:

> "As the contract in question was expressly limited to twenty-five years and as no attempt was made to grant an exclusive privilege to the Water Company, the City seems to have acted within the strictest limitations of the charter. Atlantic City Waterworks v. Atlantic City, 48 N. J. L. 378.
>
> "Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the Legislature to that effect."

The Court further said that the granting of such a franchise, not exclusive, for a term of years "does not in our opinion create a monopoly or prevent the granting of a similar franchise to another company." It is further to be observed that the City of Walla Walla expressly contracted that it would not erect waterworks of its own during the life of the contract.

The legal propositions herein contended for having been unequivocally decided by this Court, no federal question is presented in this case. Mr. Justice Brewer in Kansas v. Bradley, 26 Fed. 289, said:

> "When a proposition has once been decided by the Supreme Court it can no longer be said that in it there remains a federal question."

In the recent case of Harris v. Rosenberger, 145 Fed. 449, the Circuit Court of Appeals for the Eighth Circuit, the Court said:

> "Whether the question of the construction or application of the Constitution, or of the constitutional validity of an Act of Congress is real and substantial or is merely colorable and without reasonable foundation depends, inter alia, upon whether it is an open one in the Supreme Court, or has been solemnly and directly determined by that Court."

Not only was the contract in question void for want of power in the City to grant an exclusive franchise, but also because the contract to pay for future water rentals without the sanction of the popular vote created a debt forbidden by the Constitution of Georgia.

Cartersville Imp. Co. v. Cartersville, 89 Ga. 683.
Cartersville Water Co. v. Cartersville, 89 Ga. 689.
City of Dawson v. Dawson Waterworks Co., 106 Ga. 696.

of no value. The source of the ability of the water company to pay the interest on its bonds, and the principal thereof, as they became due was, by this ordinance and act, entirely cut off.

Was not this legislation, and legislation of a kind materially to impair the obligation of the contract then existing, and not only to impair, but to wholly destroy its value? We are not called upon now to say whether the exclusive right for thirty years, granted to the water company by the contract to supply the city with water, was legal and valid, because that is a part of the question whether the obligation of the contract has been impaired by the subsequent ordinances of the city and the laws of the State. It can not be determined that there is an impairment of the obligation of a contract until it is determined what the contract is, and whether it is a valid contract. If it be valid, it still remains to be determined whether the subsequent proceedings of the city council and legislature impaired its obligation. The ordinance and act were not mere statements of an intention on the part of one of the parties to a contract not to be bound by its obligations. Such a denial on the part, even of a municipal corporation, contained in an ordinance to that effect, is not legislation impairing the obligation of a contract. (*St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142.) It was stated in that case that the ordinance in question "created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. . . . When the substantial scope of this provision of the ordinance is clearly understood it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act, and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

In the case at bar the conditions are entirely different. There was not merely a denial by the city of its obligation under the contract, but the question is whether there were not new and substantial duties in positive opposition to those contained in the contract created and their performance provided for by the ordinances and act. The act of the legislature aided the city by granting it power to itself erect waterworks and to issue bonds in payment of the cost thereof, and the city was proceeding to avail

itself of the power thus granted, when its progress was arrested by the filing of the bill in this case and the issuing of a temporary injunction. It would seem as if the case were really within the principle decided in *Walla Walla City* v. *Walla Walla Water Company*, (172 U. S. 1;) *Vicksburg Waterworks* v. *Vicksburg*, 185 Id. 65, again reported 202 Id. 453;) *Davis &c Co.* v. *Los Angeles*, (189 Id. 207;) *Knoxville Water Company* v. *Knoxville*, (200 Id. 22.) In the last cited case the water company contended that the agreement mentioned in that case constituted a contract, for which it acquired for a given period the exclusive right to supply water to the city and its inhabitants, and it insisted that the obligation of this contract would be impaired if the city, acting under the acts of the legislature and under the ordinance mentioned, established and maintained an independent and separate system of waterworks in competition with those of the water company. It was held that such a question was one arising under the Constitution of the United States and that the Federal Circuit Court had jurisdiction thereof without regard to the citizenship of the parties. It must be remembered that in the case before us the sole question is whether the Federal Circuit Court had jurisdiction to determine the case, and we are not now concerned with the question as to how the matter should be determined, but only whether the Circuit Court had jurisdiction to determine it. As stated in *Vicksburg Waterworks Co.* v. *Vicksburg*, (185 U. S. 65, at page 82,) in speaking of the question of jurisdiction: "We do not wish to be understood as now determining such questions in the present case, for we are only considering whether or not the Circuit Court had jurisdiction to consider them."

Concluding that the court below had such jurisdiction, because it presents a controversy arising under the Constitution of the United States, the judgment of the Circuit Court is reversed, and the case remanded to that court to take proceedings therein according to law.

Reversed.

True copy.

Test:

Clerk Supreme Court, U. S.